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ABSTRACT

Papers from the 17th Annual Conference present observations and analysis of how the power equation has, or has not, been altered by the introduction of faculty and support staff unionism. The first section on power relationships between professors and senates contains: "The Academic as Political Man or Woman" (Seymour Lipset); "Governance: Senates and Unions" (Caesar Naples); and "The Debate over Academic Unions and Faculty Governance" (Irwin Polishook). The second section focuses on new directions in collective bargaining and includes: "Universities and the New Unionism" (Charles Hechscher); "The Unionization of Clerical Workers in Colleges and Universities: A Status Report" (Richard Hurd); and "Clerical and Technical Unions: The Case of New York University" (Margarita Aguilar). The third section addresses legal aspects of collective bargaining and contains: "Collective Bargaining and the Law: The Annual Update" (John Wolf); "The Duty of Fair Representation" (Warren Pyle); "Steps for Complying with Agency Fee Requirements: A Practical Guide for Unions" (Ann Franke); and "Union Security in New York State's Public Sector" (Pauline Kinsella). Four papers on faculty safeguards comprise the final section: "Arbitration of Faculty Disputes" (Maurice Benewitz and Harry Neunder); "Professors without Tenure: The British Model" (Allen McTernan); "Professors without Tenure: The British Model--A Response from the American Colonies" (John Flynn); and "Employee Assistance Programs in Higher Education: The SUNY Experience" (Karen Grover Duffy). (JDD)

POWER RELATIONSHIPS ON THE UNIONIZED CAMPUS

Proceedings
Seventeenth Annual Conference
April 1989

JOEL M. DOUGLAS, Editor

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National Center for the Study of Collective
Bargaining in Higher Education and the
Professions – Baruch College, CUNY

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INTRODUCTION

Power relationships on unionized campuses have long been an intriguing issue. We at the Center have frequently heard that faculty unionization has a propensity to alter institutional power equations, but beyond being an issue in union organizing drives, the question rarely received the attention that we believe it deserves. When the NCSCBHEP faculty advisory committee met to plan the 17th Annual Conference, we decided that "Power" would be the central theme and that we would invite speakers from various corners of academe to address the topic. We wanted to avoid the anecdotal approach, however, we knew that research on this topic was minimal. We decided to invite acknowledged authorities in the area to present their observations and analysis of how the power equation had, or had not, been altered by the introduction of faculty and support staff unionism.

DESIGN OF THE CONFERENCE

Several areas in which power is most visibly exercised were identified for analysis. These included institutional governance, faculty senates, support staff unions, tenure, and grievance arbitration. We invited Seymour Lipset, a widely recognized political scientist to present the keynote address. Dr. Lipset set the tone for the conference in his presentation of the professor as "Political Man". He also reflected upon his earlier research on faculty attitudes towards unionization which he conducted with Seymour Ladd.

To address the critical issue of what happens to institutional governance when faculty unionize, we asked two national authorities on faculty unionism, who were there at the creation, to present their observations. Caesar J. Naples, Vice Chancellor for Faculty and Staff Relations, California State University, and Professor Irwin H. Polishook, President of the Professional Staff Congress, CUNY, set forth their observations of the interaction between faculty unions and senates as well as how the power equation is impacted. Both speakers, although from different sides of the employment relationship spectrum, supported collective bargaining as a form of institutional governance.

We next turned to the unionization of support staff, a rapidly growing phenomenon on university campuses. We asked Professor Richard Hurd, of the University of New Hampshire, to present his research on this topic. Hurd is currently conducting studies in this area and was able to deliver a national perspective. Joining Hurd were five union leaders who had successfully organized support staff. Margarita Aguilar of the United Staff Association for New York University; Lucille Dickess, of Local 34 of the Federation of University Employees, Hotel Employees and Restaurant Employees at Yale University; Julie Kushner, of District 65, United Auto Workers; Diane Malmo, of the Michigan Education Association; and Marie Manna of the Harvard Union of Clerical and Technical Workers, shared with us their experiences ranging from organizing drives to strikes.

No discussion about power relationships would be complete without papers on faculty tenure and grievance arbitration and their respective roles within the university. We decided to add an international perspective to the tenure issue and invited Allen McTernan, President of the Association of University Teachers, Great Britain, to address the growing controversy in Great Britain over the abolition of tenure. McTernan presented the English model and shared with us both the union and faculty position. John Flynn, Vice President and Dean of Academic Affairs at Westchester Community College, responded to McTernan, not from the vantage point of one who advocated the abolition of tenure, but from the position of one who has studied the relationships between British and U.S history. Maurice Benewitz, the founder of NCSCBHE, and Harry Neunder, Assistant Dean for Continuing Higher Education at Western New England College, presented their findings on faculty arbitration with specific emphasis on cases involving appointment, reappointment, promotion and tenure.

The relationship between collective bargaining in higher education and the law was addressed by a panel of five attorneys. The overall legal setting was presented by John Wolf, Esq., of Rutgers University. Alfred Lawson, Esq., of the International Brotherhood of Teamsters, and Warren Pyle, Esq., of Angoff, Goldman, and Manning, P.C., Boston, addressed the duty of fair representation question; Ann H. Franke, Esq., of AAUP, spoke on, "Steps for Complying with Agency Fee Requirements: A Practical Guide for Unions"; and Pauline Kensella, Esq., of the NYS PERB, analyzed, "Union Security in New York State's Public Sector".

Charles Heckscher of Harvard University, and author of "The New Unionism" served as the luncheon speaker. He examined new trends in labor relations with particular emphasis on the role of faculty as managers.

Panel moderators represented both the "old Baruch guard" as well as several new faces. These slots were expertly and graciously filled by Thomas Mannix of SUNY Central Administration, Florence Vigilante of Hunter College, Patricia Hollander representing the American Association of University Administrators, Harold Beyer, NEA, Perry Robinson, AFT, AFL-CIO, and Melvin Dubnick, Frederick Lane, and Francis Connelly of Baruch College. John McGarraghy of Baruch did an admirable job of opening the Conference with his welcoming statement. We are most grateful to all of the speakers and moderators for assuring the success of our Seventeenth Annual Conference.

THE PROGRAM

Set forth below is the program of the Seventeenth Annual Conference. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. In those instances where the author was unable to submit a paper, while the name appears on the program, the remarks have been omitted. Opinions expressed are those of the authors and do not necessarily reflect the policy of the organizations in which they work, or of NCSCBHEP.

MONDAY MORNING, APRIL 24, 1989

8:00 REGISTRATION

9:00 WELCOME
John McGarraghy, Acting Provost, Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1989
Joel M. Douglas, Director, NCSCBHEP

9:30 PLENARY SESSION "A"
THE PROFESSOR AS "POLITICAL MAN"

Speaker:	Seymour Lipset Visiting Scholar Russell Sage Foundation
Moderator:	Melvin Dubnick Prof. and Dept. Chair Public Administration Baruch College, CUNY

10:30 PLENARY SESSION "B"
GOVERNANCE: SENATES AND UNIONS

Speakers:
Caesar Naples, Vice Chancellor for
Faculty and Staff Relations, Cal. St. U.

Irwin Polishook, President
Professional Staff Congress, CUNY

Moderator:
Frederick Lane, Professor
Public Admin., Baruch College, CUNY

12:00 LUNCHEON

Topic: "THE NEW UNIONISM"

Speaker:
Charkes Heckscher, Professor
Business Admin., Harvard University

Presiding:
Francis J. Connelly, Dean, School of
Bus. & Pub. Admin., Baruch College, CUNY

MONDAY AFTERNOON, APRIL 24, 1989

2:30 PLENARY SESSION "C"
ORGANIZING SUPPORT STAFF UNIONS

Speaker:
Richard Hurd, Assoc. Prof., Econ.
The Whittemore School of Business
Univ. of New Hampshire

Discussants:
Margarita Aguilar, President
United Staff Association, New York Univ.

Lucille Dickess, President
Local 34, Fed. of Univ. Employees,
Hotel Empl. and Restaurant Empl., Yale U.

Julie Kushner, VP of Technical Office
and Professional Div., District 65,
United Auto Workers

Diane Malmo
Central Zone Cirector
Michigan Education Association

Kristine Rondeau, Director
Harvard Union of Clerical & Tech.
Workers, Harvard Univ.

Moderator:
Thomas Mannix, Associate Vice
Chancellor for Employee Relations &
Personnel, SUNY

4:00 TECH SESSION: THE PROBLEM EMPLOYEE

Speaker:
Karen Duffey, Assoc. Prof. Psychology
SUNY Geneseo, UUP Rep. to NYS
Employee Assistance Program

Moderator: Florence Vigilante, Prof., Social Work
Project Director, Employee Assistance
Program, Hunter College, CUNY

TUESDAY MORNING, APRIL 25, 1989

9:15 PLENARY SESSION "D"
COLLECTIVE BARGAINING AND THE LAW

Speakers: John Wolf, Esq., Employment and
Labor Counsel, Rutgers Univ.

Alfred Lawson, Esq., Counsel
Int'l Brotherhood of Teamsters

Warren Pyle, Esq., Angoff,
Goldman, Manning, P.C., Boston, MA

Ann Franke, Esq., Assoc. Secretary
and Counsel, AAUP

Pauline Kinsella, Esq., Special Counsel
to the Board, NYS PERB

Moderator: Patricia Hollander, Esq., General Counsel
American Assoc. of Univ. Administrators

11:30 PLENARY SESSION "E"
ARBITRATION OF FACULTY DISPUTES

Speakers: Maurice Benewitz, Founding Director
of NCSCBHEP, Arbitrator

Harry Neunder, Asst. Dean for
Continuing Higher Education
Western New England College

Moderator: Harold Beyer, Jr., Esq.
Staff Attorney, NEA/NY

TUESDAY AFTRERNOON, APRIL 25, 1989

1:00 LUNCHEON

Topic: PROFESSORS WITHOUT TENURE: THE BRITISH MODEL

Speaker: Allen McTernan, Heriot-Watt Univ.,
Edinburgh, Scotland, President, Assoc.
of University Teachers, Great Britain

Reactor: John Flynn, V.P. & Dean of Academic
Affairs, Westchester, C. C.

Presiding: Perry Robinson, Director of College
and University Dept., AFT, AFL-CIO

12:30 SUMMATION AND ADJOURNMENT
Joel M. Douglas

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual bibliography, Collective Bargaining in Higher Education and the Professions.
- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs — complete coverage of a major problem or area, sometimes of book length.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

Designing a conference, administering its operation and publishing its Proceedings is a complex task. The Center is fortunate in having dedicated professionals who ensure the continued success of our conference program. Beth Johnson is in charge of the coordination and production of this publication, as well as the conference itself. As in the past, Beth assisted me with editing these Proceedings. Ruby N. Hill was responsible for inputting this entire volume. Jeannine Granger transcribed the conference audio tapes. Beth Genya Or and Jasmine Tata assisted at the conference. Ms. Or and Rochelle Rubin worked with Ms. Johnson in the proofreading process. The Proceedings and Conference are a group effort and I gratefully acknowledge the valuable contribution of all those who assisted.

J. M. D.

I. POWER RELATIONSHIPS – PROFESSORS AND SENATES

A. The Academic as Political Man or Woman
B. Governance: Senates and Unions
C. The Debate Over Academic Unions and Faculty Governance

POWER RELATIONSHIPS – PROFESSORS AND SENATES

A. THE ACADEMIC AS POLITICAL MAN OR WOMAN

Seymour Martin Lipset
Visiting Scholar
Russell Sage Foundation

THE POLITICS OF THE PROFESSORIATE

There are three different ways to look at the politics of the professoriate. One is behavior in the larger polity, in the larger society. Academics are people who are Democrats, Republicans, radicals, leftists, rightists, or however otherwise political orientations may be classified.

A second form of politics is within the university, a topic central to discussion at this conference in analyzing the role of the union in the power process of academe. While less important than the first, Henry Kissinger once dramatically pointed up its intensity when he said that he was able to adapt easily to the politics of Washington after having lived through the nasty conflicts of Harvard. The assumption that political controversy is more vicious, particularly on a personal level, within the university than it is in the national political arena is quite obviously true.

The third area is the struggle among academic unions, and union politics. Faculty have faced a choice among different unions, AFT, NEA, AAUP, other associations, and no union. I have done some research on the first and third topic and I have lived through the second. The Divided Academy, by Everett Ladd and myself, is a study of professors' orientation toward the politics of the larger society, and includes a chpater on unionization. Ladd and I also wrote a monograph in the early 1970s on collective bargaining in academe. The data differentiating faculty behavior, both in national politics and in union preferences, are based on large national surveys and refer to the sixties and seventies. These different areas, of course, are interrelated.

The politics of academe is part of a larger category, the politics of the intellectuals and the intelligentsia. The first refers to individuals involved in the creation of knowledge and culture, i.e., artists, scientists, scholars, fiction writers. The second and much larger group is composed of the distributors and users of what the intellectuals produce; professionals, teachers, engineers, journalists, writers, people in television, etc. Some people, of course, may play two roles, e.g., as teachers and scholars. A considerable body of quantitative evidence indicates that the intellectuals and most of the intelligentsia, minus the business related professionals like engineers or self-employed, like physicians, are disproportionately located on the left of the American political scene. They are considerably more liberal as compared to different strata, certainly as contrasted to others at their income level. They are also more left than manual workers or low income people. The 1989 Carnegie survey of the professoriate reports that 57 percent identify themselves as liberals. General opinion surveys indicate that only 15 percent of all Americans do the same. Studies of journalists and creative media people report comparable findings.

Comparative cross-national evidence suggests their propensity is actually oppositionist, anti-establishment, rather than leftist. In Germany before 1933, the earliest stronghold of the Nazis was the universities. Albert Speer described how impressed he was when Hitler visited his campus in 1931, to see him sitting on the podium surrounded by 300 professors. We do not have any quantitative survey data on German academics, but the Nazis received majorities in student council elections in 1931-1932, a position they never achieved among the German electorate as a whole. The upheavals in China, the Soviet Union and eastern Europe are led by and receive their strongest support among the intellectuals and the intelligentsia, including the students. Students tend to be the shock troops of the intellectuals as in Beijing and Prague in 1989. Solidarity in Poland may be the exception that stretches the rule, but even there, students produced major protest movements in 1968, and the intellectuals have played a major role in Solidarity.

INTELLECTUALS AS THE OPPOSITION

The tendency for intellectuals, scholars, scientists to oppose is an old one. John Adams, when President in 1798, ordered that a party of French scientists not be admitted to the United States on the grounds that people like them had caused the unfortunate events in France and were likely to disrupt the United States. One of those French scientists whom he did not want to allow into the United States was Eleuthere Du Pont, the founder of the company which bears his name.

In the 1870s, Arinori Mori, the first Minister of Education in Meiji, Japan, wrote a memorandum to his colleagues, then planning the total reconstruction of the country to catch up to the West, dealing with universities and their effect on society. He was one of the most brilliant group of planners and innovators of social change that the world has seen. Mori wrote that in order to develop, to modernize, Japan must have world class universities, major centers of research. He went on to comment that such universities are inherently sources of disloyality and treason. He argued that, in order to be major institutions, the faculty and students must be allowed to read everything, to absorb knowledge, from all over the world, and to study, write, and say whatever they pleased. In his judgement, universities which are not totally free to challenge accepted truths cannot become scientific and innovating institutions. But by doing that, they will disrupt the larger society, for they will question secular as well as scientific values. Given such behavior, he proposed that teachers' colleges should be separated from the universities. They should be located as far away as possible from the corrupting influence of research centers, since the teachers in the high schools and elementary schools must be loyal to the system, and indoctrinate their students with the establishment's values.

Thorstein Veblen, Joseph Schumpeter and Friedrich Hayek all wrote about this phenomenon in different ways and in earlier periods. Their impressionistic and documentary analyses have been elaborated in recent decades in quantitative studies based on survey data. These are reported in detail in The Divided Academy. This book brings together all the empirical data, as well as a lot of the qualitative generalizations that have been made about American academics up to the mid-seventies. And the abundant data from a number of studies show that the professoriate has been well to the left of the general public.

The surveys also validate an assumption made by many scholars, that the more research involved and successful are the most socially critical. This finding is inherent in the proposition suggested by Veblen and Schumpeter that creation is a form of rebellion, that is, requires the ability to reject what one has been taught, that originality and innovation involve a rejection of the past. Those who accept what they have been taught as gospel are not likely to be creative. They hypothesized that the persons who are most likely to be innovative are also more prone to rebel generally.

Veblen's analysis was published in 1919 in an article dealing with "The Intellectual Preeminence of Jews in Modern Science." He sought to explain why Jews are so disproportionately represented among Nobel Prize winners and among people of high scientfic attainments generally. His explanation is that as social outsiders, as marginal to the society, they have been less likely to accept traditional conventions or norms, including those in their disciplines. Jews, therefore, are more likely to be deviants, both in and out of science. Of course, if you know anything about Thorstein Veblen, who, although not Jewish, was very much an outsider, this article, as suggested by some of his biographers, was autobiographical. His basic analysis led Veblen to assume that intellectual creativity and political rebellion are different aspects of the same underlying trait. Hence those who are intellectually creative are more likely to be anti-establishment, politically innovative, as well.

Friedrich Hayek, hardly a leftist, wrote "The Intellectuals and Socialism" in the University of Chicago Law Review in 1949. At the time, he was teaching in the United States. Hayek noted that as he traveled around the United States and visited different universities, spending time in faculty clubs, he found that the dominant political atmosphere was socialist. Of course, what Hayek means by socialism is essentially the welfare state. Hayek, as you know, is an arch conservative in American parlance, although as a European he calls himself a liberal since the original and continuing meaning of the word outside the United States is laissez-faire. But in spite of his views, he reported that the brightest people, the most creative scholars, in academe are socialists. His interpretation or analysis of the phenomemon is an interesting one, one which has been verified by subsequent survey based research, essentially selective recruitment to different professions. He suggests that young conserviatives seek to run the economy or society. They become businessmen and professionals. Young leftists move into the non-profit sector or the idea oriented occupations. Hayek's argument is not that brighter people are on the left, but that the smartest conservatives do not go into academe or other intellectually related professions. Thus both Hayek and Veblen implicitly agreed that the more able an intellectual, the more anti-system he will be.

THE CARNEGIE SURVEY

In 1969, The Carnegie Commission on Higher Education did a survey of sixty thousand academics which Ladd and I subsequently analyzed. In 1975, they repeated the study with a sample of thirty thousand. These are probably the largest sets of data ever collected of any occupational group. Such samples permit an analysis, not only of the characteristics of the entire stratum, but also of many sub-groups. The 1969 one contained a thousand or more faculty from almost every discipline, a thousand sociologists, physicists, and so forth. These data validated the generalizations implicitly suggested by Schumpeter, Veblen and Hayek that the more successful academics are as research scholars, the more honorific their status, the more prestigious the university they are in, the more they have published, the greater the likelihood that they are on the left politically. Other studies suggest among intellectuals generally, not just inside academe, the Marxist view of the world is inverted, i.e., the higher the status, the more left.

Some people who read our book argued that this finding would not hold true for the very top of the profession because those at the summit are invovled in the establishment as high paid consultants. They should become conservative, the relationship should resemble a "J" curve. To test this, in 1979 we surveyed the members of the National Academy of Sciences and the American Academy of Arts and Sciences, the two more important honorific associations. They turned out to be somewhat more to the left than professors in the leading universities, who are more left than those in other institutions.

The Hayek hypothesis of selective recruitment is also supported by the data from faculty as well as student surveys. It is clear that undergraduates and graduates who want to become academics are to the left of the students who do not. In a study at Berkeley during the conservative fifties freshmen were asked about career preferences. Among those who checked professor, 59 percent described themselves as socialists. The proportion so identifying descended linearly to 10 percent among those who said they were conservatives. There have been other findings to similar effect. Thus the linkages between occupational choice and politics suggest that the Hayek hypothesis that youth cohorts sort themselves out occupationally and politically is valid.

Beyond the correlations with intellectual achievement, there is an enormous variation among disciplines. The differences among academics in the political and social orientations associated with the fields they teach is greater than between rich and poor people, as reported in opinion surveys. They can be on the order of 60 percent. There are disciplines like sociology, whose practitioners overwhelmingly give liberal responses, while others, like engineering, invariably produce conservative answers to questions. Most professors are aware of these patterns from their own experiences at faculty meetings. Those in the liberal arts generally are more liberal in the political sense than most people teaching in professional schools. Those in engineering and business schools are among the most conservative. People in medical schools tend to be somewhat conservative, while a few professional schools, like social work, tend to be on the left.

There are interesting differences within the liberal arts. The social sciences and humanities are more left inclined than the natural sciences. Theoretical fields tend to be more liberal than the experimental fields and applied subjects. Theoretical physicists and experimental physicists accordingly are very different. Theoretical physicists, like mathematicians, are much more left than their experimental discipline mates. Chemists, who are more like engineers, tend to be much more conservative than physicists. Within the social sciences, sociology, social psychology and anthropology tend to be on the liberal side. The more system related subjects, political science and economics, are less so. Economists, who are linked in their concerns to business, are more conservative than those who deal with the government. There are detailed tables for every discipline in The Divided Academy.

These discipline variations also show up in studies of students, both undergraduates and graduates. The correlations among freshmen between proposed major fields and political orientation are very similar to those among faculty. This finding suggests again a pattern of selective recruitment. A study using panel data, reinterviewing the same students two years apart on their occupational choices and values, found that those in liberal disciplines tended, statistically speaking, to be more liberal two years later. Students in conservative disciplines appeared to become more conservative. But the increased correlation did not reflect changes in attitudes as much as deviants shifting their major. Thus conservatives studying sociology were more likely to change than liberals. Liberals studying engineering moved out of the field. The correlations increased seemingly because students found their initial discipline inhospitable. Most of their fellows had different social and political values.

There is less research data available concerning the second topic, the internal politics of the university. Most of the relevant literature is contained in faculty novels, which are generally about tensions in English departments. Still all professors can report on intense conflicts within their universities and departments. What do they have to fight about? The most important quarrels are about appointments, promotions, administrative decisions, etc. They are intense because the campus is basically a small village in which professors spend their entire working lives. Universisities have a fairly stable population. There is mobility, but a very large proportion of the faculty in any one place stay put. Cleavages tend to become rigid. Cliques emerge and solidify.

Washington politics, national issues, may be bitterly fought out, but as soon as one is settled another emerges, which may divide legislators differently. They know that they are going to have to deal with colleagues on a variety of matters. They have to look upon their opponents of the day not as enemies, but as potential allies next week. Since they are engaged in many controversies, they cannot react emotionally to each one. Within the academy, there are fewer sources of cleavage, but they remain.

UNIONIZING THE UNIVERSITY

The third type of faculty politics, controversies about collective bargaining, is linked to larger political values and status within the university in interesting ways. The more prestigious and research oriented a university the less likely its faculty is to support a union. The more liberal or left disposed an academic, the greater the chances that he will vote for collective bargaining. But, as noted, the more liberal professors are disproportionaly present in the higher status sector. The answer to this conundrum lies in the fact that the research universities are basically controlled by their faculty who have considerable autonomy over their work schedules and receive high salaries. The less presitigious and more teaching oriented an institution, the less power and salary of the teaching staff.

The research universities, the top twenty of them or so, can be described as research institutions which also teach. They are the American equivalent of the Academy of Sciences in the Soviet Union and China, or the Max Planck Institutes in Germany. These are full-time research organizations. The universities, particularly in the Communist countries, are essentially teaching institutions and professors have much lower prestige than academicians. The Academy even under Stalin elected new members by secret ballot. Research scholars have a needed resource which commands respect and power.

The pattern in the American research university may be illustrated by an experience I had some time ago at a department meeting at Berkeley. After the chairman read a message from the administration about teaching, a very distinguished colleague said, "I have heard such comments all my career, but if I review my history, I must report that every salary increase I received, every offer that led to more money, was for research. I never was given an extra penny for teaching." As my colleague noted, such behavior by administrations is an instruction as to how to budget faculty time. Such views may sound very cynical, since these institutions include some of the best students in the country. Some of them teach better than others, but, as a structural analysis implies, they are essentially research institutions whose primary concern is their ability to

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maintain or extend their position as centers of scholarship, of innovation. In that context, the researchers, the faculty, have enormous power. They run the place because the administration must hold onto them. They have enormous individual personal bargaining power.

Administrations are stronger and faculties weaker the further down the academic hierarchy an institution is located. Teaching reputations do not travel. Teachers are regarded as interchangeable. They do not have "star" power, are paid less and need collective power. No matter how good teachers are in their role, it is not an activity which is exchangeable for institutional presitige in the same way that the research function is.

Unions find it difficult to organize among research institutions. Those research campuses which are under collective bargaining, like parts of SUNY or CUNY, are within major state universities where the research faculty has been outvoted by the rest of the system. The faculty opinion surveys all indicated that the more research involved and discipline presitigious a professor, the less likely he is to support unionism.

But, as noted, the other major factor correlated with unionism is political orientation. The more left an academic, the more likely he or she is to support collective bargaining. To reiterate, being liberal is associated with a research orientation, more conservative with teaching. In the 1989 Carnegie survey, 67 percent of those at research universities identified themselves as liberal, contrasted to 48 percent at two year institutions. So these two factors run counter to each other. The centers of union strength, the community and four-year colleges, have a more conservative staff than the non-unionized major universities. Clearly the level of institutions, their variation in internal power relations, in income, are more important than ideology. Ideology is determinative within a structural context; it does not override the work environment. What this also means, of course, is that the most committed, the most dedicated unionists are the more left disposed within the lower tier of academe.

DUAL UNIONISM

Finally I would like to discuss a comment frequently expressed about the effect of dual or multiple unionism, that such competition has an adverse effect on organization. It sounds logical that unions fighting each other should have a negative impact on collective bargaining. But there is contradictory evidence.

Changes in the overall strength of labor organizations in the United States seem particularly relevant. The high point in union density, the proportion of employees in American trade unions, was reached in 1955-1956. At that time, roughly one out of every three employed American workers belonged to unions. From then on, the rate has gone down. It is now about 16 percent.

What happened in 1955? The most noteworthy labor event was the merger between the AFL and the CIO. Unification was supposed to result in all sorts of good things, organizational growth, increased political influence, and the like. There is no direct evidence of a cause effect relationship, but it may be relevant that American unions have declined since the federations united. I doubt that the merger was the only or even the major factor involved, but it probably explains some of the variance. Competition may be good, not only for the economy, but for the union world as well. When union officers have rivals, they work hard to beat them. The AFL leaders from the late thirties on were furious at the rise of the CIO and their consequent loss of status. They fought harder and the AFL grew enormously after the CIO was organized in 1935.

What industry has the most competition today? Teaching. Which one has three million union members? Teaching. I may be doing those who are members or officials of the teachers' unions an injustice, but I get the impression that nothing makes an NEA or AFT officer happier than winning over a jurisdiction that has been in the hands of the other. The competitive sense is extremely strong between them. Is competition really bad? Is dual unionism really destructive?

POWER RELATIONSHIPS – PROFESSORS AND SENATES

B. GOVERNANCE: SENATES AND UNIONS

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THE NATURE OF THE PROBLEM

In the early days of collective bargaining between faculty unions and universities, a cottage industry developed to showcase the predictive abilities of a generation of sages. These experts delivered what appeared to be profound – if cynical – observations about the future of collegial governance in the face of increasing faculty interest in collective bargaining.

Senates, they said confidently, are doomed. Unions will quickly percieve them as antagonistic to collective bargaining. Administrations will soon recognize them as forums to provide "two bites at the same apple". And faculties will eschew them as ineffective "company unions," with no power or significance other than to set up an artificial dichotomy within the faculty with the inevitable effect of diluting faculty influence and energy. Management, they said, will cease consulting with senates because they will merely be "fronts" for the unions. Their agendas will be cleverly designed to further the goals of the collective bargaining agents and frequently, they said smugly, the very same faculty leaders will occupy leadership positions in both organizations. Quod Erat Demonstrandum!

I well recall years ago, in this very forum, one observer characterized collegial governance and senates as essentially dishonest forms of faculty-administration interaction. His explanation was, I believe, that senates exist at the sufferance of management. They have only such power as may be granted to them by the "bosses". Out of gratitude, I suppose, they would cave in on every issue of importance, sell out their faculty colleagues and provide the administration with a patina of propriety in its actions. This observation most obviously overlooks the fact that these are faculty members we are talking about. You know, the people who, when they are trying to get rid of a troublesome colleague, give him or her a lousy recommendation, virtually assuring that he will not get that new job somewhere else and will have to stick around.

These are faculty members with tenure who view the institution with a sense of ownership justified by the likelihood that they will outlast every one of the administration in the place. And as so well delineated in Yeshiva[1], and there are faculty who set standards for admission, academic progress and graduation; they hire, evaluate, promote, reward, punish themselves and their colleagues; decide what to teach, when to teach it, who will teach it, and how to teach it.

I do not know about you, but in my experience, I have not found many faculty members — in senates or not — willing to roll over as the doomsayers based their dire predictions on. I guess that is what was missing in the predictions of inevitable withering away of senates: real world experience — either with collegial governance or collective bargaining.

Now I will be quick to admit that in those early days there were some false indicators that could give those eager for the laurel a push in the wrong direction. There were a lot of issues, legal and otherwise, that had yet to be settled. And, they could easily mislead ivory tower theorists. For example, some were concerned, in those early days, that the principle of exclusivity would surely do senates in. That principle, otherwise known as the "to the victor belongs the spoils" principle, states that management may only lawfully deal with the union that won the election or had the majority of the bargaining unit signatures, and that the other unions have no legal status to represent anyone in the unit. It is a good principle, for both management and unions, but it is misplaced here. The fact that the successful union has the exclusive right to represent all persons in the bargaining unit with respect to matters within the scope of bargaining does not, of course, mean — directly or indirectly — that a senate may not consult with the administration on other matters not within the scope of bargaining such as curriculum, admission standards and the appointment of academic administrators.

Unfortunately, that did happen in some instances. In Minnesota, for example, the selection of an exclusive bargaining representative prompted an attorney to advise, for the reasons of exclusivity described above, that the academic senate be discontinued on each campus. Since the successful bargaining agent was a coalition of campus senates affiliated with the NEA, it may have appeared to the outside observer that the senates had been replaced by a union. All it takes is one or two instances of this type to lend credence to this belief. We know that whole articles have been written — indeed, entire careers have been built — on experiences like this that are out of the mainstream. By the way, the same thing almost happened in the State University of New York, when the faculty senate sought a place on the ballot, opposing the AFT and the NEA. A fortunate PERB decision concluded that it would be inappropriate for the senate to be on the ballot thereby, forestalling the inevitable questions of autonomy and freedom from management influence.

There were probably other instances where both labor and management predicted or threatened the demise of collegial governance as the inevitable result of unionization, so that one of the first acts following the vote for a bargaining agent saw the administration and the faculty busily setting out to dismantle the senate. I recall meeting with a group of university presidents in Florida immediately following the election of the faculty union when one of them said "...but they promised that the senates would disappear when the union was elected!...."

In fact, rather than serving as the harbinger of doom for the senate and the concept of collegial governance, the evidence about collective bargaining is to the contrary. One of the more perceptive observers, Joe Garbarino of Berkeley, not included in my earlier description, in a study undertaken in the late 1970s, noted that faculty participation in governance increased for a number of institutions that unionized. He suggested, by way of explanation, that these faculty may have used collective bargaining to preserve governance influence "in the face of threatened attacks." While I am not certain that his explanation follows, I suggest a simpler one.

Both collective bargaining and senate consultation are different forms of the same thing: faculty involvement in institutional decisionmaking. A faculty interested in enhancing its role in governance through collective bargaining is more likely to seek all possible forums for its expression rather than to reduce them. This is precisely what, in my experience, has happened. And, I wish to point out, the enhanced interest in senates is not only the prerogative of the faculty. Administrations have sought to encourage senates, as well. In both New York and Florida, moribund or non-existent systemwide faculty senates were developed or enhanced in the years following the advent of faculty bargaining. For a variety of reasons, I believe this to have been a wise move. There are many issues that are of concern to the faculty and which the administration wants or needs faculty involvement that are outside the traditional scope of bargaining. Issues of mission, role and scope of the institution, development of schools or individual programs are among them. Matters of educational policy such as those affecting student life, including admissions standards and conditions for the awarding of degrees, are other examples.

SHARED GOVERNANCE

The existence of the senate reaffirms the commitment of both the faculty and the administration to a collegial relationship. Although I quickly point out that the bargaining relationship can well be collegial also, I suggest that, during the early years of bargaining at least, the parties may be tempted to explore the full potential of what it means to have an adversarial relationship. One of the many reasons employees, in general, and faculties, in particular, may select a bargaining agent is to have someone who, on their behalf, can shake a fist under the nose of the administration. It is useful, then, to have a visible reminder that we are colleagues and have an ongoing commitment to a, perhaps less adversarial, way of dealing with issues.

It is helpful to keep in mind that collegial governance mechanisms such as senates continue to exist because the participants voluntarily support their existence, rather than because the law requires that the parties deal with one another as in the case of a collective bargaining relationship. Collective bargaining laws require the recognition of a bargaining agent selected by the faculty in accordance with law. Either management or the union can compel the other to sit at the table and bargain over negotiable issues. There are rules to govern the relationship and a labor board to interpret and enforce them. There is little that is voluntary in a collective bargaining relationship.

Collegial governance is quite different. At any time, if the administration believes that the senate is no more than the union seeking two bites at the apple, it can withdraw its attention and support from the senate. If the faculty perceives the senate as a device to fractionate its voice, it will cease to participate in senates. And if the union leadership views the senate as an institutional rival, it will seek to replace it or coopt it. Its continued existence is public testimony of the desire of the parties to maintain collegiality.

It is often convenient for the parties to a bargaining relationship to have an alternate forum in which to address issues. Some matters, either inherently or because of their particular history on campus, are better dealt with in the often more leisurely-paced or more open and more apparently deliberative forum of the senate. Bargaining issues must be resolved by the time a new agreement goes into effect, by the time the new budget year begins, before the expiration of the old contract, before the rival union collects enough signatures to file for a new election, or before the faculty return for the new term. Many issues benefit from a more prolonged and open debate so that the rationale is more clearly understood and accepted by the university community than some tablets brought down from the bargaining table on the mount by a latter-day Moses. Other issues, perhaps too "hot" for the parties to deal with at the bargaining table, cool down a bit during the open debate on the floor of the senate.

If the bargaining relationship becomes too adversarial — if the parties are constantly at each other's throat and every issue becomes an occasion to bash the other side — it is helpful to have a senate where institutional rivalries do not necessarily drive the debate. Often matters can be resolved in the senate that would be politically or psychologically impossible between the union and management.

One should not overlook the importance of little victories in the scheme of things. They are reminders that problems between the faculty and the administration can be addressed and resolved even when the bargaining relationship is rocky for the moment. One of the difficulties with an atmosphere of mistrust between the administration and the union is that the parties are quick to forget their successes as soon as another controversy arises between them. Matters successfully addressed in the senate can encourage the warring bargaining parties to seek similar successes in their own forum. While the senate can be drawn into the fray, it need not and can serve as a designated neutral zone and a place where communications can be kept open.

THE CALIFORNIA MODEL

California's higher education collective bargaining law specifically recognizes the importance of collegial governance mechanisms even as it mandates faculty collective bargaining. First, it declares in the preamble to the statute that:

> The Legislature recognizes that...consultation between administration and faculty...is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational mission of such institutions, and declares that it is the purpose of this act to both preserve and encourage that process. Nothing contained in this chapter shall be construed to restrict, limit or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices including the Academic Senates...with respect to policies on academic and professional matters....[2]

Later on, in the portion of the statute defining the scope of bargaining, the law excludes from scope:

> Criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees....[3]

and states that these shall be the "joint responsibility of the Board of Trustees and the Academic Senate." If the Trustees withdraw this item from the "joint responsibility," then, the law goes on to say, it becomes part of bargaining with the faculty union.

THE CSU ACADEMIC SENATE

The reference to the importance of the collegial relationship and to the

Academic Senate has encouraged the administration, the faculty, and the union leadership to respect the senate and its jurisdiction. After an initial period following the election of an exclusive bargaining agent and the commencement of collective bargaining in which it seemed confused as to its role, the systemwide Academic Senate is stronger than ever. One of its first actions in response to the advent of collective bargaining, was to commence a study of its role and jurisdiction. After long debate, it issued a paper entitled "Responsibilities of Academic Senates within a Collective Bargaining Context" in 1981, which was clarified in a series of letters between the Chancellor and the Chair of the Senate. An important line of demarcation was drawn when the senate declared that it would not participate in the process of collective bargaining, and that "except under emergency or crisis conditions":

> matters affecting wages, hours of employment, and other terms and conditions of employment shall not be considered by the senate...(and) The Academic Senate shall endeavor to ensure that educational and professional matters do not become subjects of bargaining.[4]

Since those statements were written, the senate has generally kept to its jurisdiction even though it has, at times, been tempted to enter disputes between the bargaining parties, indeed, as those parties have been tempted to address senate issues. The wisdom of avoiding this temptation has kept all the parties relatively honest.

For example, in the initial contract the parties lengthened the probationary period preceding the award of tenure. Defended by the contracting parties as a "job security" issue and therefore, well within the scope of bargaining, the senate asserted that this was an "educational" issue over which it had "joint responsibility" with the Board of Trustees. The matter was discussed at length by all the parties and resolved when the parties determined to be more vigilant in discerning the educational implications of such matters, and in deferring them to the Senate-Trustee forum in the future.

The Senate and the Board of Trustees have since jointly studied and issued a policy paper on the use of student evaluations in the evaluation of faculty for retention, promotion and tenure, and that paper has been implemented through Trustee policy. It is now part of every faculty evaluation which themselves are provided for in the collective bargaining agreement.

THE TRIPARTITE PROCESS

Some months ago, the president of the faculty union, the chair of the systemwide academic senate and the Vice Chancellor for Faculty and Staff Relations at the California State University met to consider a coordinated approach for the support of the University's budget request in Sacramento. As the conversation continued, they began to discuss the difficulties in sorting out issues that had only impacts on salaries, wage, and other terms and conditions of employment, on the one hand, and those that had only educational implications on the other. As an example, after spending much time in debates that sounded much like "how many angels can dance on the head of a pin?", it became apparent to us that such distinctions were arbitrary at best, and contentious and provocative at worst.

We concluded that we might continue the discussions we were having, perhaps with slightly expanded representation from each of the participants, without regard to those artificial distinctions.

We met again on a number of occasions, and what took shape was, for us, a new idea. We called it the "Tripartite Process." Any of us could suggest an issue for discussion in this forum. That issue would not be discussed if any of the participants chose not to discuss it. If, however, the three of us wanted to discuss it, off the record discussions would commence, not binding on any of the parties in any other context. What we sought was a consensus on the issue.

We agreed that if, at any time, any of the participants decided that continued discussions might compromise its constituents, it would terminate the discussions. In other words, we were there voluntarily, and only so long as we chose to be there. And we were there without commitment except to consider seriously that which the others raised. The first issue we addressed — and frankly, we were looking for small and easy victories in an effort to build up a track record of success for this process — was faculty professional development. Historically, that has been a confusing issue in the California State University with serious debate over whether it was a fringe benefit, and therefore, negotiable or whether it was an educational program.

Indeed, we had treated it both ways. It was a matter of continuing consultation with the academic senate; the academic senate would frequently suggest budgetary initiatives to enhance the current program. At the same time, the collective bargaining agreement contained a fairly extensive clause including the subject.

The substance of the agreement is not important for our discussion, but I think what followed is significant. We turned to the question of what to do with this consensus. The union and the administration insisted that the contract be modified to include the new agreement. The academic senate suggested also that the systemwide policies governing faculty development be modified. This would be accomplished by inclusion of the new provision in a Trustee resolution.

What evolved then was the understanding that the issues would be freely discussed among the three parties, and a consensus sought. Once achieved, that consensus would represent the essence of the agreement in collective bargaining, and the essence of an agreement in consultation with the senate. The administration would then sit down at the bargaining table with the union and negotiate changes to the existing bargaining agreement. It was anticipated, since consensus had already been reached in the tripartite process, that negotiations would proceed with relative ease. A parallel consultative process, consultation between the Trustees and the systemwide senate would result in a modification of systemwide policies as appropriate. Again, it was contemplated that those discussions would proceed without difficulty since agreement had already been achieved in the tripartite process.

I suggest that this tripartite process is basically sound. It brings together the perspectives of the collective bargaining agent, as well as the academic senate. It does not require either to reach an agreement; and, indeed, while it did not happen in our experience, issues can be removed from the tripartite process by any party unilaterally and taken to the bargaining table or the consultation room for exclusive resolution there; although I would anticipate that that removal would be unusual.

The positive aspects of this process are many and, I think, significant. The first is that the full spectrum of faculty leadership can be brought together in a conversation about important issues without the organization having to take political positions. Furthermore, the organizations are spared the turf battles that often occur, especially when the proper forum for the issues is not crystal clear. The institution lessens the risk of reaching an agreement in either forum, and then seeing that agreement attacked as unsound or inappropriate by the missing third party. It would appear to be to the advantage of both the union and the senate to be free of that risk as well.

Both the union and the senate should also be free from the paranoia and the suspicion that could be generated by the administration meeting with the other on potentially the same issues even though the law would protect the union against the administration bargaining with a third party. The ever-present fear that the administration is undercutting the union as it meets with the senate (or vice versa) is one that all should be happily rid of.

There are also advantages for the administration. For one, all the perspectives that the administration should consider will be in the same room at the same time. They, therefore, can be explored, considered, balanced and weighed together at once. Differences among them can be resolved more easily. Additionally — and importantly — agreements reached will have the advantage of the full support of most factions of the faculty.

My assessment of the tripartite process is that it can be helpful in any kind of relationship. If the parties enjoy a good, cooperative comfortable labor-management relationship, bringing all together should facilitate agreement and enhance support for the results. In troubled relationships, the open discussion should reduce the level of mistrust and paranoia that any two of the three parties are conspiring to undo the absent third party. Even where the union and management are having difficulty talking to one another, the senate leadership can, perhaps, be of significant help in facilitating that communication.

I recognize that this may be perceived by any of the participants as a risky endeavor and it may take courage to attempt it in the face of constituent skepticism. Nevertheless, I believe that advantages so outweigh the downside, it is worth exploring.

PROBLEMS ON THE HORIZON: PART-TIME FACULTY

Now I would like to turn to some issues that will pose problems for senates and unions and that are threatening their coexistence. The major period of growth and design of faculty senates came at a time when the overwhelming majority of college faculties were full time. Their professional energies were exclusively and fully devoted to the educational life of the institution and encompassed — in addition to teaching and research — service to the campus and the community, as well as counselling and advising students.

The rise of faculty unions and collective bargaining in the 70s coincided with the massive increase in the number of part-time faculty in our institutions. That number continues to increase. Faculty bargaining units very frequently include both full- and part-timers and, as a consequence, decisions reached at the bargaining table necessarily are affected by the interests of the large number of part-timers in the unit. Most part-time faculty are not involved in the life of the university beyond their classroom responsibilities and their concerns are more bread-and-butter. The issues of greatest importance to them tend to be job security, eligibility for fringe benefits, and the like — issues of classic concerns between employees and their employer.

Senates, typically, are composed of the full-time faculty. Their perspective is that of their constituents and they see themselves less as employees and more as the academic core of the institution. Senates look at all aspects of the university and each is appropriate for senate concern.

It is this significant difference in perspective and emphasis that can place unions and senates in divergent positions. The California Tripartite Experiment may turn out to be a victim of this difference in perspective.

Recently, the union withdrew from the tripartite process and has refused to resume the meetings. We are in dispute, at the moment, over issues precipitated by actions taken by the state legislature in the budget process — despite the fact that we are in the middle of a four-year contract that was intended by both sides to make bargaining unnecessary during its term. The specifics of the dispute are not important for our discussion and, indeed, it is quite possible that the disagreement might not have disrupted our tripartite relationship had that process not also disconcerted our part-time faculty.

Our institutions are being faced with a challenge. The change in the nature of our faculty — from primarily full time to significantly part-time — must result in a change in our governance structures. Many of our unions have already accommodated to this basic transformation of our faculty; most senates have not. I worry that the kind of academic policies developed in our collegial governance structures may be missing important elements: the perspective of a large number of our faculty, the part-timers, or worse, their support and respect.

In 1976, Victor Baldridge and Frank Kemerer, also not among the false prophets, polled university presidents, as well as union and senate leaders seeking their predictions concerning the future of senates. They reported the same sort of gloom and doom that was the rage at the time. Unlike many of their colleagues, they decided, however, to follow up — to check after more of the evidence was in — to determine whether the pessimistic predictions were accurate. In 1981, they found and reported that the earlier prophecies appeared to be wrong. They concluded that unions and senates were learning to live together.

But I am worried about the California experience. Perhaps, it is too soon to bring the union and the senate together to work on issues. Or, perhaps, unions and senates can coexist so long as they do not attempt to do so too intimately. The most worrisome possibility is that the difference in their constituencies may make them — and their visions of the academy — incompatible.

As we enter the third decade of faculty collective bargaining, the academy will have to learn to accommodate the needs of the part-time faculty. Whether the senates will adapt remains to be seen.

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POWER RELATIONSHIPS – PROFESSORS AND SENATES

C. THE DEBATE OVER ACADEMIC UNIONS AND FACULTY GOVERNANCE

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THE AAUP POSITION

The latest policy of the AAUP on faculty unionization, the "Statement on Academic Government for Institutions Engaged in Collective Bargaining," adopted by the AAUP Council last June says in part:

> Collective bargaining should not replace, but rather should assure, effective traditional forms of shared governance... From a faculty perspective, collective bargaining can strengthen shared governance by specifying and assuring the faculty role in institutional decision making... From an administrative perspective, contractual clarification and arbitral review of shared governance can reduce the conflicts occasioned by ill-defined or contested allocation of responsibility and thereby enhance consensus and cooperation in academic governance... When legislatures, judicial authorities, boards, administrations, or faculty act on the mistaken assumption that collective bargaining is incompatible with collegial governance, they do a grave disservice to the very institutions they seek to serve...[1]

For the AAUP that is a profound statement. It represents the reversal of a position it took originally regarding collective bargaining and indeed, the end product of a process of change in its positions over a period of more than twenty years. What this statement says is that the union, first of all, is a faculty organization; secondly, that the union contract itself is a means of protecting and nurturing those academic concerns to which faculty relate; and finally, that collective bargaining is not a substitution for but a supplement to the normal governance on a campus. In other words, the union and the activity of the union through collective bargaining are not to be seen as pushing out the experience faculty have had and the purposes to which facculty put their instruments of self-government.

This raises the question of why there has been so much interest in collective bargaining and governance as a subject. Even before unionization became a reality in the academic world more than twenty years ago, there was continuous discussion of the question: Will collective bargaining conflict with or supersede faculty governance? One reason, obviously, is that faculty as employees are different from employees in virtually every other type of setting, including many professional settings. So the thought was, since the faculty were different, the instrumentalities to which the faculty attach themselves should naturally be different from those of other workplaces.

There was also the thought that the very idea of a union is alien to a university. What gives this notion substance as an almost instinctive reaction is that it appears to challenge what is perhaps the last frontier of independent employment, namely, the faculty member as a kind of intellectual entrepreneur. It is very difficult to organize entrepreneurs to begin with; it would be virtually impossible to organize, some thought, the intellectual entrepreneur. Most of the other professions in the United States do have organizations, frequently very powerful, associations that have all the power of unions, whatever they might call themselves. The faculty were among the last to band together and organize. And part of the reason for that is the character of faculty, their individualistic self-perception, the professor, the status identification by which they differentiate themselves from other types of employees. So it was not difficult for all of us, whether we were favorable to unions or not, to hesitate before embracing the idea that we too should be unionized like workers in the industrial sector.

Indeed, the concept of the industrial sector and the industrial model and the industrial union, something we wanted to distinguish ourselves from, became a standard that was used — among ourselves and more so by management — to argue against the unionization of the faculty. Underlying the argument was the simple-minded conception, even among important scholars who study industrial relations and collective bargaining, that what goes on there is entirely or mostly an adversarial process involving tradeoffs and deals and bargains. What is more, this process was juxtaposed against an academic model and represented as a kind of corruption of the type of idealism that faculty feel is inherent in their own politics. I would venture to say, if I had to characterize faculty politics, in the ideal, it would be as a striving on the part of the academic community for consensus, rather than conflict. The collegial ideal is so sacred that people begin to think that it is the reality and they tend to forget, in the rendering, the amount of stress and conflict that really does exist in the academic community and has always existed there.

Moreover, the notion that there are strong faculty organizations that represent faculty glosses over the reality that they are limited to a very small number of institutions historically and are hardly characteristic of the entire broad band of institutions of higher learning in the United States from the beginning to the present. Believe it or not, Harvard is not like the rest of the country. Even Harvard and Columbia and Berkeley have their stress and difficulties. The places in which governance as we traditionally think about it is most firmly entrenched are and always have been in a minority among the institutions of higher learning in the United States. Do we still remember Senator Joseph McCarthy? During his heyday, witch hunts were conducted among the best academic institutions, and not only were the faculty cowed, but the faculty were cowed by administrators who were afraid to allow professors to exercise their best instincts in self-governance, to make judgments about whether their colleagues should be fired, whether their colleagues should be subject to the pressures and mandates that were imposed from outside the university. All of this is to say, the reality of what goes on in the marketplace of the academic community is really very different from what we think because we want to think it is different. It is very difficult to overcome that illusion. It renders us susceptible to arguments, slogans and all sorts of approaches by those who want the faculty to take particular positions on particular issues, but especially collective bargaining.

A LOOK AT THE LITERATURE

To document this point, it might be useful to go back to what Jacques Barzun called the first scientific study of higher education ever published, The Academic Marketplace,[2] by two sociologists, Theodore Kaplow and Reece J. McGee, printed in 1958. It was, for that time, a fairly sophisticated work, acclaimed by people familiar with the dynamics of higher education. The table of contents is one indication of what I would say is the reality of shared governance. The chapter called "Academic Government and the Personnel Process" has the following topical subheadings: "Who Participates in Faculty Recruitment," "Some Perspectives on Participation, Stresses Between Department Members and Chairmen," "Stresses Between Deans and Departments, Stresses Between Deans and Higher Administration," "The Resolution of Stresses," and "Some Observations on Power in Universities."[3] These topics and the discussions in the text were not instigated by union organizers. In fact, unionization and collective bargaining are not covered in the volume at all, and they do not appear in the index. These were among the major documented concerns of the academy more than thirty years ago.

Clearly, the reality of higher education and its governance, with some limited exceptions, is that shared govenance has not characterized most institutions of higher learning in the United States. What went on in most places was the reality of conflict that faculty, for different reasons, either chose to ignore or, as Kaplow and McGee observed, were compelled to ignore because the power that resided in the academy did not reside in the institutions of faculty participation.

We have only to go back to the history of the organization of the AAUP itself in the early 20th Century to find some significant clues to these more recent phenomena. In Academic Freedom in the Age of the University,[4] which is one of the landmark books on the development of academic freedom in the United States, Walter Metzger describes the "deep aversion among academic men to entering into an organization whose purposes smacked of trade unionism."[5] Would you believe that Metzer is referring to the AAUP before the First World War? "The idealism of the profession, built on the rhetoric of service and sustained by psychic compensations, eschewed any activity that had material gain as its main object. The ideology of the profession, claiming to transcend all ideology, did not countenance permanent commitment even to an organization for self-help like the AAUP and even with its limited agenda. The dignity of the profession, fashioned on a genteel code of manners, was opposed to the tactics of the pressure group" — the AAUP.

Metzger also describes the reaction of administrators and trustees to the reality of the AAUP as a faculty organization:

> Management reacted to the development of the AAUP code on academic freedom by creating its own organization to oppose the AAUP called the Committee on Academic Freedom of the Association of American Colleges. It was founded in 1915, the same year as the formal founding of the AAUP. It denounced as presumptuous the creation of the AAUP

> and the notion of academic freedom and tenure and it said, no way has yet been found to play the cello or the harp and at the same time to direct the orchestra. What they meant is simply this: If you want to be organized, you can't participate.[6]

The committee resorted to an argument perennially used by conservatives, the basic solidarity of all interests, a concept that cropped up again in more recent years, as we shall see. The committee said, there is an incompatibility of sensibility between an organization of professors and an educational institution: If you don't like it here the way we run it, and if you want to create institutions that look like trade unions, don't expect to continue participating in running it. What provoked the committee in 1915 was AAUP's presuming to formulate a code relating to academic freedom. Management painted AAUP's founders with the broad brush of unionism and denounced them for creating divisions within the academy that should not exist, warning them that they would not have available to them opportunities for participation in governance because it is incompatible with the solidarity of interests, the loyalties that must obtain within an institution of higher learning, which must be imposed by the administration rather than originate with the professors.

THE CUNY EXPERIENCE

If that was the reaction of administrators and trustees to the formation of the AAUP in 1915, one can imagine the reaction of managers to the first demands for collective bargaining in our country something over twenty years ago. In fact, it was very similar, at City University, for example, when it was on the verge of becoming the first major institution of higher learning to become unionized. Management reacted by creating a debate about compatibility, but it was mostly a device to discourage bargaining. Management used the bogey of incompatibility as an argument and a weapon, shamelessly and cunningly.

A document that the City University Chancellor circulated when we first began to consider bargaining dated November 20, 1968, just over 20 years ago, has a section on exclusivity which includes this passage:

> If a bargaining agent is chosen by the faculty, and that agent obtains an exclusive right of representation, the Board and administration of the University will be precluded by law (in bold type) from negotiating with any faculty groups, agencies or individuals except the organization designated as the exclusive collective bargaining agent.[7]

That is not what happened, nor has that been the reality of academic bargaining.

Another section in this document called "Scope of Bargainable Issues" states:

> It is clear, however, that in some cases the demands of collective bargaining agents may be inconsistent with the traditions of college teaching as a profession.[8]

And it invoked what is still a current argument, the danger, threat, instinct of unions to interfere with everything. The Chancellor goes on to say:

> The faculty now make many decisions which in industrial situations are considered prerogatives of

> management. They hire, fire and promote their fellow professionals and have the major responsibility both for the activities of their students as well as the educational program which is the primary reason for the existence of the institution.[9]

All of which is meant to suggest that if bargaining were to be adopted, the faculty no longer could act as managers — they would be debarred from that activity — with everything that would ensue from that, namely, the denial of their participation in shared governance and in the reality of professional control over those things for which you hire faculty anyway. None of this ever happened at City University, nor has it happened anywhere else since.

Also in this document, the Chancellor went on to quote, at length, from what was then AAUP's formal statement of policy on "Representation of Economic Interests,"[10] advising faculty not to engage in collective bargaining and indeed, rejecting collective bargaining — a position from which the organization has retreated to the position that I represented at the outset.

THE FORDHAM EXPERIENCE

At City University and at Fordham University where collective bargaining narrowly lost when collective bargaining emerged as an issue for the faculty, management suddenly discovered shared governance and began to create all sorts of faculty organizations. We, for example, were bestowed with a university faculty senate, for the first time, in 1968, seven years after the creation of the university and, by happenstance, the same year as the first collective bargaining election. At Fordham, similarly, where no university-wide faculty bodies existed, management began creating them very quickly as a way to ward off collective bargaining. Cleverly, management said to the faculty, we want you now to play a part, to ward off collective bargaining, and if you do go ahead and unionize, you will be denied all of the normal and expected means of participating in the academic community, some of which were novelties at that time.

One document circulated in the Fordham campaign by the vice president of the institution, Raymond G. Hewitt, dated October 5, 1971, said the following:

> A successful unionization of the Fordham faculty would require a drastic alteration of our present system of shared governance. Given the formal labor-management relationship required by the collective bargaining process, the university could no longer share the governance of its affairs with the faculty. It is inconceivable that the faculty could — at one and the same time — assume the role of labor and management. The resulting conflict of interest is so obviously apparent that even the most ardent labor organizers find it difficult to dismiss.[11]

At Fordham, the election was lost by a very narrow margin and, for reasons that have to do with the differences between these two institutions; at CUNY the election was won by an overwhelming number. I cite those two as instances of the antithesis set up by academic managers between collective bargaining and governance for the purpose of discrediting collective bargaining.

The AAUP developed arguments quite similar to the administrators'. Although they have not disappeared, these voices from the past sound strange articulating ideas that the AAUP has now disowned. Here is a former AAUP president:

> The AAUP generally rejects exclusive representation by unions or any other external agencies, because it has a different view of the proper organization of a faculty and of the faculty's position in that organization. Central to the AAUP's position is its commitment to the proposition that faculty members in higher education are officers of the colleges and universities. They are not merely employees.[12]

The subliminal message is that "employees" are people who work in the boiler rooms and offices. The professors are not employees in that sense; they are different. They have direct professional responsibilities to their students, their colleagues and their disciplines. To a very considerable extent, faculty are part of management. That was the argument of AAUP, that governance and collective bargaining were incompatible, that the introduction of collective bargaining would create conflict. AAUP, like management, invoked a golden age of faculty shared governance which had never existed at the preponderant majority of American institutions. They papered over all of the conflict inherent in academic life and introduced the threat of conflict as a new danger inherent in the alien and disruptive nature of bargaining.

Why were faculty willing to listen to it? One of the reasons is that the academy was in trouble. By the late 1960s and early 1970s, the university was in crisis, and I think a profound crisis, for a variety of reasons: student revolt, the impinging of social and political issues on the university, the Vietnam War, all of which stirred up a pervasive feeling that was apocalyptic, that the world they knew was coming to an end. The very legitimacy of the university was being questioned. It is not hard to understand why an organization like the AAUP and its leaders would take a hard-line position against something new and threatening.

Besides, there was self-interest involved. The AAUP then was the leading organization in higher education, with approximately 95,000 members. Its numbers have dropped drastically since that time as membership in the organizations represented either by AFT or NEA in higher education has increased dramatically. So there was a defensive purpose in warding off the opposing organizations, as well as the conviction, which may have been genuine, that bargaining was not a good idea. It was a status quo reaction, maybe even a reactionary response, and curiously, as I have suggested, a reaction that defied the historical experience of the AAUP itself.

FAILED PREDICTIONS

The arguments AAUP leaders threw back at unions, in concert with management, were the very same that were levelled against AAUP fifty years earlier as reasons why professors should not form their own association. They were not entirely absurd arguments; they were sincere. But when you have apocalyptic times, people are driven to prophecies, and academic prophecies tend to embarrass their otherwise respectable authors.

Joseph Garbarino, for example, of the University of California at Berkeley: "Unionization and participation in governance are inversely related."[13] In other words, the less governance you have, the greater the chance for bargaining. That was true. But the reverse — the more unionization you have, the closer you approach the elimination of governance — that was never true. "It is difficult to avoid the conclusion," he wrote, "that as bargaining agents become firmly established, other faculty mechanisms will find themselves restricted to a relatively narrow range of internal academic functions."[14] That never happened.

Consider these predictions by Fred Crossland of the Ford Foundation, who wrote a piece in 1976, the lead article in *Change* magazine,[15] which begins: "During the final quarter of this century, faculty unionization in higher education will continue to increase significantly." Well, it did for a time; it is not doing so now. "Most notable will be the growth of collective bargaining in public colleges and universities, but the rapidly shrinking private sector of higher education will also tag along." That did not happen. "In the not too distant future, faculty unionization and collective bargaining will be the national norm." It surely is not. "Classroom teachers may well become minorities within their own unions." That never happened. "On the national scene, meanwhile, the big three faculty organizations — AFT, AAUP and NEA — will gradually end their well publicized and acrimonious struggles for hegemony and devise accommodations unthinkable today." You know something? They are still unthinkable. "It is probable that a single national union will emerge." Never happened. "These developments will obviously have serious consequences for governance of colleges and universities. Both internally and externally, effective faculty unionization will tend to tilt the balance of power on campuses away from presidents, chancellors and deans. The latter will certainly not be rendered impotent, but they may become more administrative than executive." If that means that they were going to have a diminished role, it decidedly did not happen. "Instead of setting basic institutional policy, their prime responsibility (that is, the prime responsibility of presidents, chancellors and deans) will probably be to carry out the terms of the union contracts."[16]

THE *YESHIVA* ISSUE

Pop scholarship was thus invoked to corroborate the illusion of faculty as managers. It was spurious, insidious and significant. One of its legacies was this line of reasoning: If we have governance at Fordham, which we just created, and if we say to faculty at Fordham, we are going to give you a chance to participate in governance — admittedly under the control of the administration of the institution — nonetheless, with the appearance of shared governance, with participation that might be decisive in some things — but without compromising the ultimate power of the administration over the process — if that is the case, are not faculty truly operating the university? And then, are not faculty like managers in the way they control things? And then, as it was alleged during the founding years of the AAUP, are not faculty expected to identify with the institution so that they have an undivided loyalty, an identity of interest with the institution as defined by its administrators? There are chief managers and lesser managers, but they are all of one. If faculty have bargaining, that unity is impossible.

That was the argument at Fordham. That was the argument at CUNY. That was the argument used by trustees against AAUP in 1915, and that was the argument articulated by AAUP fifty years later. Successive presidents of the association repeated the contention that the faculty are really in control, hoping, by saying that, the faculty would forgo bargaining. They never thought, however, that by the same rhetoric, bargaining would be rejected for faculty by the United States Supreme Court. The Supreme Court's decision in *Yeshiva*[17] is the ultimate conclusion of the argument that I have traced about the relationship between faculty and governance: the faculty pervasively control the educational enterprise.

That myth has been engraved in stone because the independent union representing the Yeshiva faculty allowed management to establish the evidentiary record in this seminal case. The union did not describe the reality — of a faculty not really in control, with no meaningful role in the governance of the university, which is why the union was organized in the first place: The faculty senate had not met in many years; there were no universal governing bodies at all; the control of the institution by management was almost absolute. Instead, the union allowed administrators to fabricate a record. It was not done at the first test by the National Labor Relations Board. In fact, the appellate court, the Second Circuit, chastised the NLRB for not doing so, and proceeded to make up the record itself. The court held an evidentiary hearing and the administration responded without contradiction by the union's attorneys.

The evidentiary record created by the Second Circuit Court was the experience on which the United States Supreme Court based its conclusions: Yeshiva is a "mature" university pervasively "operated" by a faculty whose control is "absolute". Those were the words of the United States Supreme Court. As a result, the Supreme Court held, on the basis of an ironic comparison to industry, an alignment of interest might be expected between what the institution is supposed to do and its management sets out as its mission and what the faculty should expect to do. Nobody would allow people who are operating the institution and controlling its decision making to have a divided loyalty from that of the administration. Because the faculty are managers, they must have undivided loyalty, and if that is the case, they may not have collective bargaining. Notice the significant implication of the faculty's status as managers: As academic professionals, whether classroom or administrators or otherwise, they must, in the performance of their duties, have an undivided loyalty to the management of the institution, but, at the same time, remain autonomous and be expected to criticize. That independent function is different, usually, from what managers are permitted. Nonetheless, undivided loyalty is the test, and alignment of interest is the process, and under those circumstances, the faculty cannot bargain under the protection of the law. Faculty are still free to organize in the private sector, but they can be fired and dismissed for it without so much as a word.

Is it hard to imagine what might happen at a mature private university some day under *Yeshiva*? What might happen after an institution declared its policy academically and professionally is to exclude unions, if a faculty member goes out and tries to unionize anyway, despite being tenured, and is dismissed? Would academic freedom and tenure survive that challenge? The nature of *Yeshiva* and the thinking behind *Yeshiva*, though the Court was divided 5 to 4, is such that it represents a threat much wider than simply to faculty unionization, but a threat to academic freedom itself and shared governance as we understand it, an alien ideology undermining faculty as academic professionals who must indeed be free and autonomous.

Yeshiva is the current reality, but its "facts" do not govern the present debate. After twenty years, most scholars who have studied the question have come to the conclusion that academic governance, however it is defined and however it manifests itself, and collective bargaining in real experience over two decades, are entirely compatible. Barbara Lee, for example, in an article in *The Journal of Higher Education*[18] in 1979, summarized the history to that point and arrived at the same conclusion. In fact, she said, not only her own findings but those of all the scholars at that time, discounting the pseudo-scholars, were that they are not merely compatible; where governance exists it does not disappear, where it does not exist governance arises, and where it does exist it is generally strengthened by unionization. The experience is exactly the opposite of what had been predicted. And there is a host of other writings going up to, for example, a very extensive study by Professor Margaret Chandler at Columbia and Daniel Julius, former director of employee relations at California State University, "Governance in Unionized Campuses,"[19] using an enormous data base, and they all reach the same conclusion. The data are exhaustive, the research has been done, and the results are in.

CONCLUSIONS

Now, why do people still assert faculty governance and collective bargaining are incompatible? And why do professors listen? Well, because some people are still enamored of the illusion of shared governance; some people are still enamored of their idealized self-image as faculty; some people are particularly enamored of what administrators tell them; and, for obvious reasons, not only are people who know better willing to defy experience to say it, but the concept of incompatibility continues to be useful in the warfare over unionization.

One of the significant lessons to be learned from this history is that ideological confusion can be very dangerous to academic life. The confusion that was engendered about faculty as management beginning in the 1960's, independent arguments of AAUP presidents and other faculty leaders which paralleled those of administrators at Fordham and CUNY and elsewhere which led to Yeshiva, seems to suggest the wartime slogan: "Loose lips sink ships." What they have done is to try to sink the ship of collective bargaining, and they have indeed contributed toward installing a formidable deterrent in the private sector. But, they went far beyond that, beyond their intentions, through Yeshiva, to endanger the professor by creating a threat to academic freedom and tenure and faculty governance that we have never had before.

I do not believe, for one minute, that the faculty owe undivided loyalty to the institution. That cannot be. Their loyalty must be to their profession and the obligations of that profession in the conduct of research and the dissemination of knowledge to their students. Undivided loyalty has no place in such a world. Professors can be denied the right to organize, the right of self-government or participation in governance, but they cannot be described ideologically as owing undivided loyalty to anybody except to themselves, to their individual integrity and, most significantly, to the collective integrity of their disciplines in the community of higher learning.

Academic professionalism will not outlast the coercion of institutional patriotism orthe spirit of Yeshiva. Nor can it condone management's ideological campaign against unions within the university. What faculty aspires to is the recognition by management that the common good can be served only in an academy bound together by enduring faculty rights and responsibilities. That goal transcends shared governance.

FOOTNOTES

1. American Association of University Professors, "Statement on Academic Government for Institutions Engaged in Collective Bargaining," Academe, 73, No. 6 (November-December 1987), pp. 25-26.

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3. Caplow and McGee, p. x.

4. Walter Metzger, Academic Freedom in the Age of the University (New York: Columbia University Press, 1955).

5. Metzger, p. 196.

6. "Report," Committee on Academic Freedom and Tenure of Office, Bulletin, Association of American Colleges, III (April 1917), pp. 49-50, cited in

Metzger, p. 209.

7. Office of the Chancellor, The City University of New York, "Collective Bargaining at City University? — Issues and Procedures," November 20, 1968, p. 7.

8. Office of the Chancellor, p. 8.

9. Office of the Chancellor, p. 10.

10. American Association of University Professors, "Policy on Representation of Economic Interests," AAUP Bulletin, 54, No. 2 (June 1968), pp. 152-153, cited in Office of the Chancellor, p. 11.

11. Memorandum, Vice President Reiss, Fordham University, October 5, 1971, quoted in Matthew W. Finkin, "A Faculty Perspective," in Raymond G. Hewitt, ed., The Effects of Faculty Collective Bargaining on Higher Education, (Wellesley, MA: New England Board of Higher Education, 1973).

12. Ralph S. Brown, Jr., "Collective Bargaining in Higher Education," Michigan Law Review, March 1969, p. 1070.

13. Joseph W. Garbarino, "Creeping Unionism and the Faculty Labor Market," in Margaret S. Gordon, ed., The Carnegie Commission on Higher Education, Higher Education and the Labor Market, (New York: McGraw-Hill, 1974).

14. Garbarino, p. 325.

15. Fred E. Crossland, "Will the Academy Survive Unionization?," Change, 8, No. 1 (February 1976), pp. 38-42.

16. Crossland, p. 38.

17. National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980).

18. Barbara A. Lee, "Governance at Unionized Four-Year Colleges: Effect on Decision-Making Structures," The Journal of Higher Education, 50, No. 5, (September-October 1979), pp. 565-585.

19. Margaret K. Chandler and Daniel J. Julius, "Governance and Unionized Campuses," Thought and Action: The NEA Higher Education Journal, vol. 1 (Spring, 1985), pp. 17-30.

II. NEW DIRECTIONS IN COLLECTIVE BARGAINING

A. Universities and the New Unionism
B. The Unionization of Clerical Workers in Colleges and Universities: A Status Report
C. Clerical and Technical Unions: The Case of New York University

NEW DIRECTIONS IN COLLECTIVE BARGAINING

A. UNIVERSITIES AND THE NEW UNIONISM

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THE NATURE OF THE PROBLEM

It seems a little strange, when you stop to think about it, that grown people should spend a lot of time and money arguing about whether university professors are managers or workers. The Supreme Court of the United States gave this matter its weighty consideration in 1980 and concluded, in the Yeshiva decision, that faculty are managers because they have substantial influence on university policy. The dissenters on the Court, however, said, no, professors are workers because they cannot affect many crucial conditions of employment.

Of course, most normal people would say that university faculty are neither managers nor workers. They are professionals, certainly, and equally certainly, employees. They have, in many cases, significant concerns about their employment conditions. They can have some influence, not usually very much. But none of these key characteristics places them on either side of the line. They do not spend much of their time either being managed or managing others; it makes very little sense to try to cram them into this set of categories.

Such common sense, however, is foreign to the world of labor law. There the question is all-important: for if faculty in private sector universities are managers, the government will not protect their efforts to unionize. So even if the question makes no sense, someone has to answer it.

If faculty seeking more voice accept the terms of this debate, they therefore, have two choices. They can act more like workers: abandon institutions of collegiality such as peer review and faculty senates, move towards a straight adversarial model with explicit contractual rules and grievance mechanisms, and build the unity and militancy of the faculty in opposition to the administration. A few advocate this option wholeheartedly, but most appear less willing to put on such an ill-fitting coat. A "worker" approach to representation would deny 500 years of history of the development of faculty governance institutions, as well as ignoring the very real autonomy and discretion which continues to be central to the professional work of faculty.

The other option within the current labor-law framework is to accept the position of "manager" and to use the traditional mechanisms of managerial influence, such as informal "open doors" and appeals to personal relationships. But, in many situations, this too, is clearly inadequate: there are real differences of interest which cannot be covered over by appeals to loyalty and shared goals. And those differences have grown sharper as the business viability of universities has become more independent of their academic strength, and as administrators have seen themselves increasingly as managers rather than coordinators of peer relationships.

As Sherlock Holmes once observed, when you have eliminated all plausible alternatives, whatever remains, however implausible, must be correct. If the options of existing labor law are wrong for the situation, then the answer must lie outside those traditional options. Let us explore what they are.

"NEW UNIONISM" EXPERIMENTS

The "traditional" model, that envisioned in labor law, establishes an exclusive government-recognized representative of a body of workers. This body has the authority to bargain with management on a restricted range of issues: not on general policy, but on matters which directly affect worker interests. When negotiation fails, the legitimate power base is a strike after the expiration of the contract. When there are conflicts during the contract, the generally approved remedy is formal grievance ending in outside arbitration.

Among the results of these constraints are that workers and their representatives must remain very distinct from management; that relations between the two groups must be determined by detailed rules; and that those rules must be agreed on and enforced by centralized organizations to maintain uniformity. These characteristics — centralization, rule-boundedness and adversarial relations — are precisely those which create such discomfort in an academic setting.

But, it is important to note that the academic setting is not unique in this respect: most workplaces have been experiencing discomfort with traditional unionism in the past decade or two. The rate of unionization has, of course, declined markedly — not just recently, but for thirty years, from a high of over 35% organized in the mid-fifties to less than 15% today. "White-collar" workplaces, where employees straddle the worker-management line, have rates significantly lower than that. Public opinion polls have shown a severe erosion in support for the institutions of organized labor, including among union members themselves. And in all these settings the common themes in the discontent are the same ones which are problematic in universities: rule-boundedness, adversarial attitudes, and bureaucratic centralization.

The significance of this erosion of support is demonstrated most vividly by the fact that unions are casting about for new approaches. Within the very bastions of traditional unionism, such as autos and steel — the old-line mass-production industries which spawned the current system — there has been an increasing tendency to try things which are clear breaks with "unionism" as we have known it. There is a certain irony here: while faculty unions are looking for a way into the labor relations order, many industrial unions are looking for a way out. This is another symptom of the strangely self-contradictory nature of labor relations these days.

What do I mean by trying to get "out" of the labor relations order? Here are some examples of current experiments:

1. EMPLOYEE INVOLVEMENT: A growing number of industries are involving workers directly in decision-making about their jobs. In some cases, this

takes the form of problem-solving groups which make recommendations for change; in others, it involves semi-autonomous teams who have direct power over issues such as scheduling, assignments, hiring, and sometimes discipline. Both of these can now be found throughout the steel and auto industries.

This kind of involvement is, of course, commonplace in faculties, but it is radical in traditional union workplaces. It reverses seventy years of "Scientific Management," based on the assumption that managers should think and workers should do. It therefore, cuts across the management-worker line which defines the labor relations system much as do faculty senates or other forms of collegiality.

2. LABOR-MANAGEMENT COMMITTEES: Though there have always been some joint committees in areas such as health and safety, the last decade has seen a tremendous expansion in their number, power, and scope of action. In particular, they have moved into the domain of operational decisions which has traditionally been an exclusive management preserve. Ten years ago it was unheard of for a union official regularly to attend the planning meetings of a plant manager; now it is not uncommon. Then it was unthinkable for a union representative to sit on a company's board of directors; now there are several such cases, and several more in which the union has indirect but close communications with the board. Joint committees on product quality have proliferated and have extended their recommendations into every corner of business activity, from purchasing to customer relations to work organization.

   Again, these are instances in which unionized employees have extended the scope of their activity well over the "management" line. In doing so, they have necessarily moved away from the emphasis on adversarial and reactive relations which has characterized labor strategy since the 1930s. Unions, like the auto workers and the steelworkers, among many others, have begun to take joint responsibility for major decisions and to plan ahead for developments still to come.

3. EXTENDED BARGAINING: The classic pattern of centralized triennial bargaining is likewise being rapidly modified. The old labor relations order, setting management against labor, relies on closely defined bodies of rules to keep disagreements under control most of the time. A periodic window of contract renegotiations allows for the modification of these rules. But, increasingly, the parties are seeking ways to increase flexibility by modifying the relationship as needed. Some negotiations have left important issues unresolved in the contract, giving them to joint committees to work out over a long period. Contracts have, in many instances, become shorter and less detailed leaving interpretation to ongoing joint bodies. A few companies and unions have moved towards the notion of a "living contract" which has no fixed deadlines.

As these initiatives are pieced together, they begin to fill in a picture of a "new unionism" different in crucial respects from the old. The themes of these efforts are decentralization, inclusion, and flexibility. They create forms of representation which do not depend on a strict opposition of workers to managers: they allow the working out of interests which are partly convergent but partly distinct. They rely less on rules than on principles, and they seek to involve employees as directly as possible in those decisions which shape their work lives.

Why have old-line unions explored these new avenues? Not from vague idealism: they have been pushed into them because the old tactics have not been working. The reasons are many. The triennial contract has become too clumsy a mechanism for dealing with a rapidly changing competitive and technological environment; if you have to wait for the next round of bargaining to respond to management initiatives, you are way behind the times. Management decentralization has made it harder to pull together the united masses of workers which made the strike an effective weapon. Management also, faced with the Japanese challenge, has tried to draw workers into contributing their ideas to the productive process. This has been confusing to unions; and what is still more confusing, workers have generally responded enthusiastically to such involvement. The strict bureaucratic hierarchy which framed the adversarial model of labor relations has been chipped at from many angles.

Most important, in the long run, all parties find an intuitive appeal in the approaches I have cited. It is not just professionals who want representation to be as direct as possible with few rules or bureaucratic procedures; to judge from the polls and from the response of workers to the experiments I have cited, everyone wants something like that.

So what is the problem? If we have models, and we have desires, why not just do it? In the context of this meeting, we want to know how to construct a system of representation which fits the conditions of universities; does not employee involvement, joint committees, and expanded bargaining give us the answer?

REPRESENTATION AND POWER

Not quite: there remains one missing piece which undermines this solution. Any system of representation must rest on a foundation of power — that is, the different interests must have some way of making sure that they cannot be ignored. You cannot trust in trust alone — there are not enough saints around. (Or, as Woody Allen puts it more pointedly: the lion may lie down with the lamb, but the lamb may not get up in the morning). A relationship based on unequal power is usually unstable, a truth which is amply demonstrated by the state of labor relations today.

The three types of experiments I have described systematically undermine the two existing guarantees of the labor relations system: the power of the government, and the power of the strike. They reduce the ability to strike by dividing the workforce into smaller units (that is what decentralization is about); thus, they open up the possibility of management "whipsawing" workers against each other and undermining the solidarity which is the foundation of unionism. As for the government, which has since 1935 committed its power to maintaining the viability of collective bargaining, it is left on the sidelines by the new developments. The law does not support employee involvement, joint committees, or extended bargaining; in many ways, it opposes them. The Yeshiva decision, with which we started, is clear evidence because it essentially suggests that ongoing employee involvement in decision-making is not compatible with unionism as defined by the state.

While the new initiatives undermine the old forms of power, they do not, in themselves, create new ones. They are weak reeds. When employment involvement, for instance, begins to run up against issues and policies which go beyond the immediate environment, it generally finds itself blocked; it has no leverage to force the management bureaucracy to pay attention. Joint committees find themselves similarly bounded. Because of the limitations of their power base, these forms of decision-making typically run through a pattern of early enthusiasm followed shortly by loss of momentum and gradual decline.

Thus, while employee involvement and joint action may form an adequate future ideal, in the actual present, they are unstable. They work when trust is high, but when trust declines, there is a flight back to the "security base" of the traditional labor relations system.

One serious warning to employees who would move too quickly in this direction is the plight of the United Auto Workers. That proud union is today deeply torn between those who advocate employee involvement and those who claim that the new tactics have weakened the union's ability to resist management pressure for concessions. This split has done grave damage to the union and has also made it very difficult for General Motors to pursue its strategy.

Perhaps the most instructive case is the struggle of the Eastern Airlines machinists. Only three years ago that unioon was involved in some of the most dramatic and hopeful experiments in employee involvement to be found anywhere in the country: a wide network of shopfloor groups was producing huge cost savings as well as improved morale, and the head of the Eastern local sat on the airline's board. But these structures never stabilized: Frank Borman's ambivalence kept them continuously unsettled, and Frank Lorenzo's open hostility destroyed them. As the company began using its power against employees, its labor relations system retreated rapidly from its forays into new territories to the most traditional adversarial militance, culminating in the desperate and mutually destructive battle of the recent strike. It is a vivid demonstration of the basic instability of new forms of representation in an old framework of power.

So that is, in essence, why we are locked into the absurd topsy-turvy world I described at the beginning in which university faculty must strive to define themselves as blue-collar workers in order to achieve a type of representation which nobody really likes anyway. They have to do that because the real alternative is not a better type of representation: it is no representation at all on many crucial issues. A distorted and artificial voice is better than none. So both managements and unions find themselves drawn towards a model which satisfies neither of them.

Now let me suggest briefly some ways out. The direct path is blocked, as I have indicated, but some indirect routes offer a chance of escape from this realm of absurdity.

What we need, I would argue, is a better form of power — better in the sense that it establishes effective leverage but does not lead towards centralized confrontation. The old weapons of the strike and the National Labor Relations Act have grown too feeble to support employee interests. Even where the labor law clearly applies, unions can rarely overcome the resistance of a determined employer in an organizing drive. As a result, in the last irony which I will mention today, many unions in traditionally organized industries are again searching for alternatives to the very sources of power which faculty unions are seeking to embrace.

One promising alternative source of power is public pressure. Despite some efforts at community relations, most unions have not been very good at building alliances with others or at making their case for the public interest. But there have been some notable recent developments. The "corporate campaign" has focused stockholder and customer attention on companies resisting unionization, and even produced pressure on members of the boards of these companies; this tactic succeeded at JP Stevens where traditional union organizing had failed. The AFL-CIO has mounted a campaign called "Jobs With Justice," which seeks to build movements in local communities, pulling together all groups with claims on business — environmental, minority, community, and other associations — to build pressure for their interests. Another form of power is ownership: through

Employee Stock Ownership Plans and other mechanisms employees have gained significant stakes in companies in the airline, construction, and steel industries.

But the most significant development, in my view, is the dramatic growth of legislated and court-defined employee rights. Twenty years ago unionization was pretty much the only way to develop a set of rights in the workplace; but as unions have declined, government has moved to fill the breach. The civil rights legislation of the sixties was the first big step, later amplified at the federal level by extension to age discrimination, and, in many states, by the inclusion of other categories — political belief, sexual preference, and so on. Other legislation has begun to establish rights to privacy and speech (at least in the form of whistle blowing). Meanwhile, the courts, quite independently, have placed significant limits on the previously inviolate ability of employers to fire without justification.

Today there is a ragged patchwork of rights which are enforceable by all employees, unionized or not. It is a strange and irrational system which differs from state to state and from court to court. But, it has reached the point now that employers usually fear being sued more than they fear being unionized.

Many unions view these governmental extensions of rights as unfair competition. Others, however, have started to make use of them for additional leverage. Discrimination suits, in particular, have been used as effective mechanisms of representation by unions whose members include large numbers of minorities and women.

Now, these additional forms of power have several advantages. First, they add to the leverage provided by labor relations law giving unions more options and more security. But more important, they do not depend on holding together masses of people in unified action — as does the strike — and therefore, require less dependence on centralized contracts as a point of reference. They are therefore, forms of power which can support a more flexible system of representation.

They are not, however, sufficient in themselves: without state backing, they are chancy. Thus, the best unions today — those which have moved furthest in the direction of the "new" forms of representation I have described — are those which have pulled off an uneasy compromise: they have combined the old and new forms of power.

The Steelworkers are one such example. They have managed to maintain their old bases of power, including the willingness to strike, and they have also been leaders in the use of publicity campaigns and in creating employee stock ownership vehicles. This combination of tactics has made them extremely effective in developing creative, flexible forms of employee and union involvement from the shopfloor to the highest levels of management. And the steel industry, by the way, is now doing very nicely from a business perspective as well.

Closer to today's topic is the fledgling union of clerical workers at Harvard. That union could never have overcome the strong opposition of management without the support of the labor relations law; but their success depended equally on the creative use of community pressure. Their organizing theme was not the traditional appeal to resentment of the boss: the main slogan was, "It's not anti-Harvard to be pro-union." And their initial negotiations have been unusually open, involving, and decentralized. Management professes itself pleased.

I introduce these examples from the realm of traditional unionism because it is the area I know best, and because many university unionists have at least an occasional tendency to look to this realm for models or warnings. But it is undoubtedly true that the lessons can flow both ways: developments in faculty unionism, especially concerning the coexistence of collegial senates with collective bargaining, can be instructive to the industrial sector. What seems to be happening, in fact, is a process of convergence. In the traditional world, unions and professional associations were seen as incompatible opposites. Today many associations are adding collective bargaining to their repertoire, and unions are adding "association-like" structures of involvement to theirs. Both are seeking to create a form of representation which does not cram people into the boxes of workers vs. management and which does not take the form of centralized adversarial relations — and which is therefore, effective now for both employees and management.

By now, there is enough experience to draw further specific lessons about how to approach a system of decentralized participation, once the relationship is established:

1. ESTABLISH INITIAL PRINCIPLES: Some things need to be straight from the beginning. The initial agreement should include, at a minimum, an affirmation of the equal role of the union in coordinating new forms of participation. It should also have a statement of the goals of these efforts — why the parties are embarking on the experiment. That sort of statement, it turns out, is extremely valuable as a kind of gyroscope, keeping the participatory structures from wandering too far off track without locking in detailed rules. As one union official puts it, "The principles are like the conscience of the company."

2. DEVELOP THE SKILLS OF UNION OFFICIALS: Most union officers are skilled in interpreting contracts and negotiating the complex procedures of grievance and arbitration. Those abilities are inadequate to the "new" forums, and one of the great dangers in experimenting is that union leaders will be overwhelmed by the new tasks. Worker involvement is hard to manage: like any kind of democracy, it can lead to internal disputes and bickering. Union officers have less power to control the disagreements than in a traditional rule-based system: they need to be able to build unity around principles rather than sticking to the letter of the contract.

   Joint committees may require, in addition, more technical skills. Many unions have, for instance, resisted getting involved in planning for technological change. This seems to make no sense — would it not be better to help shape the future than react to it? — until one recognizes that unions can rarely match companies' technical knowledge, and so fear being drawn into a deal which they only partly understand and which could hurt them. Unions which have entered into such joint efforts have had to bring in knowledge of technology, financial planning, and many other areas which have been foreign to them.

3. EDUCATE THE MEMBERSHIP: Like any form of democracy, again, the extension of employee representation must be founded on education. If the members do not understand the principles, they will end by destroying the framework which holds the parties together.

   Several unions have met this need through thorough strategic planning processes, initiating multi-year processes of discussion of the goals and methods of the organization. Through these processes, which have involved local officers and members thoroughly, they have built a much richer appreciation of the basic policies of the union than can ever be achieved through the slogan-shouting of strike years.

Under these conditions, it has been clearly demonstrated that a union can retain its strength while exploring wider and more effective forms of involvement.

For university unions which can retain labor law support — faculty in the public sector, clerical and support workers everywhere — the application of these lessons is relatively direct. The situation is much more complicated where labor law does not stretch. I do not have a clear solution to the problem of representation of private sector faculty. To try to develop new forms of leverage such as publicity campaigns or suits without also having NLRA support is certainly risky. On the other hand, NLRA support would not be sufficient in itself to overcome management resistance or to construct a "new" form of unionism. Thus, the tactics for the present need to include two prongs: trying to get included in the NLRA through a change in the Yeshiva decision and developing the newer sources of power. Of these two, the latter is probably the more plausible. I can scarcely imagine that there are any universities today which are not vulnerable to community pressure or discrimination suits; it would be interesting to try leveraging that pressure into a system of representation.

I have directed my remarks primarily to employees seeking representation. Let me take a minute to look at the management perspective. Again, there are two distinct situations: where you have a union, and where you do not. If you have one already, you certainly want to move towards a relationship of the type which I have characterized as "new": that is, flexible and decentralized. In order to do that, however, my analysis suggests a paradoxical requirement: you need a strong union. If you try to use flexibility to divide and weaken the employees, you will create a backlash: the union will retreat to the only source of power available to it which is mass confrontation. A weak union cannot be flexible; a strong one can. Thus, I suggest that it is in management's interest to help the union in, or at least to avoid undermining its efforts to develop its internal communications and education.

Where there is no union the case is less clear. In the short run and for individual organizations, it is probably better, or certainly less aggravating for managers, to remain unorganized. But I would argue that, in the long run, a good system of representation is good for management, as well as employees. A system which is decentralized and flexible and which includes employee representation and joint committees and extended bargaining, strengthens relationships and commitment at all levels.

Too often today management assumes that there is only one form of unionism, a bad form — one which will impose rigid rules and divide the employee body. There is plenty of evidence today, however, that the "good" alternative I have sketched is real, not just a figment of my imagination. It deserves support from all parties.

A wise management with a long-term view will seek to create the same kind of system of representation which is attractive to employees. If it does not, it is liable, in the long run, to end up with the worst aspects of the old order as people turn back to the confrontative and adversarial tactics which are their only recourse. If that happens, we will have managed to institutionalize a dichotomy between workers and managers which seems senseless, but which, in current circumstances, sometimes seems the only way to achieve a fair measure of voice.

FOOTNOTES

[1] NLRB v. Yeshiva University, 444 US 672 (1980). That decision was, in turn, based heavily on NLRB v. Bell Aerospace, 416 US 267 (1974), which was the first explicit delineation of the management-worker line. Before that time, the distinction had been so much taken for granted that it hardly needed discussion; it is only now that the line has begun to be blurred in the real world that the courts are trying to specify it with greater clarity.

[2] See, for instance, Lehmann, Michael B. "The Industrial Model of Academic Collective Bargaining." In Douglas, Joel M., Collective Bargaining at the Crossroads. New York: National Center for the Study of Collective Bargaining in Higher Education, 1982.

[3] See, for example, Lipset, Seymour Martin and Schneider, William. "Organized Labor and the Public: A Troubled Union." Public Opinion, August-September 1981: 52-56: "Labor Unions are One of the Least Trusted Institutions of American Life." A 1985 Harris poll commissioned by the AFL-CIO also showed significant levels of discontent among union members themselves.

[4] Some argue that employer opposition, rather than public attitudes, is the primary cause of union decline. Employer opposition is certainly crucial, but I see it near the end of the causal chain rather than at the beginning. Employers have been able to get away with increasingly open anti-union sentiments because the public no longer supports unions with the clarity of the prewar period. And the opposition is effective, in part, because the commitment and solidarity of union members themselves has declined. It is hard to say that employer opposition is stronger now, for example, than in the 1930s, when extreme physical violence against union organizers was common; yet, at that time, the employer opposition just galvanized labor action.

[5] The Republican administrations of the 1980s have certainly reduced the effectiveness of government support for unions. But the decline of the National Labor Relations Act framework antedates the Reagan years: in 1978, for instance, under a Democratic administration, unions sought mild reforms in the labor law — and lost.

[6] Ten or fifteen years ago most initial agreements unequivocally defined collective bargaining issues as off-limits for the "new" forums. It has turned out to be impossible to maintain two hermetically sealed domains: ideas which emerge from joint committees or shopfloor problem-solving groups will sooner or later have implications for the contract as well as for management policies. Thus if employee participation is to be effective, it must have channels for proposing changes in contracts and policies. The systems of expanded bargaining referred to above are, in part, a response to this need.

[7] The Communications Workers and the Bricklayers are two unions which have engaged in such strategic planning processes. In both cases, committees composed largely of local officers spent two years preparing an initial report; this was followed by a long period of education and publicity among the membership.

[8] An employer cannot, of course, legally give direct assistance to a union. But it can agree to allow time off for educational activities; it can make it easier for union officials to talk to the members; and it can avoid undercutting the unions' communications. These steps may seem like strengthening the enemy, but they actually lay the foundation for effective cooperation.

NEW DIRECTIONS IN COLLECTIVE BARGAINING

B. THE UNIONIZATION OF CLERICAL WORKERS IN COLLEGES AND UNIVERSITIES: A STATUS REPORT

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The 1980s have presented a myriad of problems for the labor movement as membership and bargaining power have declined in manufacturing, construction and transportation. Attempting to come to grips with the new reality of an economy dominated by the service sector, unions have expanded their organizing efforts among white collar workers. In the process, they have discovered a particularly receptive clientele among the clerical employees of colleges and universities. This paper identifies factors which influence the outcome of clerical organizing drives on campus, estimates the extent of organization among these workers, and summarizes recent developments including strike activity. It is based, in large part, on interviews with over fifty union officials, and on a survey of nearly 300 university and college personnel administrators.

ORGANIZER INTERVIEWS

Although there is some targeting, most organizing campaigns are initiated in response to inquiries from dissatisfied clerical workers. As is true with other clericals, organizing is a slow process. University and college clericals are skeptical of unions and fearful of strikes, and carefully evaluate the decision to support an organizing campaign. When a substantial portion of the workforce has knowledge of unions through direct participation or involvement of a close relative, skepticism diminishes and organizing proceeds more quickly. In a similar vein, if leaders of a preexisting staff association support union affiliation, the rank-and-file are less resistant to the idea. At both Vassar College and Cuyahoga Community College, for example, the staff associations decided to seek a union to represent campus clerical workers. After relatively brief campaigns, the unions selected by the staff associations won handily — CWA at Vassar in 1985, and SEIU at Cuyahoga in 1983.

College and university clericals are more likely to support unionization if they are convinced that the bargaining agent will be controlled by the membership. Because of this common desire for "ownership" of the local, most unions have adopted a grass-roots approach with large organizing committees coordinating the activities of rank-and-file members who do the organizing one-on-one. Although this process is time consuming, it builds a strong base of highly dedicated union activists whose commitment seldom falters. Two well known examples of this style are the Yale University campaign by the Hotel Employees and the Columbia University campaign by UAW District 65.[1]

While the mass participation model is well suited to many single campus campaigns, particularly where there is ambivalence towards unions, it is not always necessary or appropriate. On large state university campuses and in multi-campus or systemwide representation elections, media oriented high-tech campaigns have proven to be an effective alternative. These campaigns rely on polling and opinion research to assess support for the union and identify issues important to potential supporters. They also use telephone banks, targeted direct mail, campaign specific newspapers, and radio and television advertising to get the union's message across. AFSCME, the recognized leader in this style of organizing, effectively applied these techniques in two major clerical victories: the University of California System in 1983, and the Iowa University System in 1984.

Public colleges and universities are easier to organize than their private counterparts for a variety of reasons. Budgetary data, lists of employes and other information are easier to obtain, facilitating the organizing process. In states where the Democratic Party is in power, political pressure can be used to assure relative neutrality from the university's administration during the campaign. Perhaps most importantly, public schools typically have not resisted unionization as resolutely as have private schools.

The attitudes of faculty members towards unions play an important role as well. Most clericals enjoy their association with faculty members and thus, have few serious complaints with their direct supervisors. Faculty opposition tends to make unionization a difficult choice for clericals who do not want to be ostracized for supporting a union. On the other hand, where the faculty is sympathetic clerical organizing is much easier.

On a related point, some union officals complain that the prestige associated with university employment is an impediment to organizing. Because most university and college clericals are proud of their jobs and their association with faculty, organizing campaigns typically target the university administration as the source of work-related problems. A high level of dissatisfaction with the administration is seen by many organizers as a pre-condition for a successful representation election.

Many organizing campaigns focus on women's issues such as pay equity, child care, and maternity leave. The prestige issue is sometimes turned on its head with union supporters pointing out that clericals receive little notice or credit while faculty, professional staff, and students are all accorded social status because of their involvement in higher education. The feminist tilt of university clerical unions is in clear contrast to other clerical organizing where traditional trade union issues dominate.

SIMILARITIES WITH OTHER CLERICAL ORGANIZING

Two published scholarly articles on the unionization of white collar workers are useful supplements to the organizer interviews. An article by Hurd and McElwain (H-M)[2] on determinants of organizing success among private sector clericals is summarized in Table 1, while an article by Maranto and Fiorito (M-F)[3] which analyzes the impact of union characteristics on representation elections in white collar units is summarized in Table 2.

Both studies confirm that fear of strikes is an impediment to union organizing success among white collar clericals. H-M concludes that a strong and vital union movement in an area contributes to organizing success among

TABLE 1

ENVIRONMENTAL VARIABLES WHICH SIGNIFICANTLY AFFECT VOTES IN NLRB ELECTIONS AMONG CLERICAL WORKERS

Negative Impact	Positive Impact
Size of Unit	Union Membership in State
Strike Activity in State	Growth in Union Membership in State
Stipulated Election	Employment Growth in Industry
Ordered Election	
Clerical Employment Ratio For Industry	

No Impact
Election Delay
Voter Turnout
Clerical Wage in State

Source: Richard W. Hurd and Adrienne McElwain, "Organizing Clerical Workers: Determinants of Success," Industrial and Labor Relations Review, April 1988, v. 41, pp. 360-373.

TABLE 2

UNION VARIABLES WHICH SIGNIFICANTLY AFFECT VOTES IN NLRB ELECTIONS AMONG WHITE COLLAR WORKERS

Negative Impact	Positive Impact
National Control of Bargaining	Union Democracy
Union Dues	Direct Benefits Provided by Union
Union Propensity for Lengthy Strikes	Union Rivalry

No Impact
Union Wage Level

Mixed Impact
Union Jurisdiction

Source: Cheryl Maranto and Jack Fiorito, "The Effect of Union Characteristics on the Outcome of NLRB Certification Elections," Industrial and Labor Relations Review, January 1987, v. 40, pp. 225-240.

clericals, a result consistent with the observation by organizers that familiarity with unions is beneficial. The grass-roots, mass participation approach to organizing seems appropriate based on M-F which finds that democratic unions are supported by white collar workers, while unions characterized by centralized power in the national union tend to be opposed. The potential negative influence of management resistance strategies is corroborated by the H-M results which reveal the dampening effect of legal challenges in stipulated and regional director or board ordered elections. On the other hand, H-M demonstrates that clerical workers are unlike other private sector employees in that representation election delays do not reduce union support, a result consistent with the slow moving organizing process which builds strong commitment as described in the interviews.

Finally, the conclusion by M-F that union jurisdiction has no clear impact on white collar workers is certainly consistent with the experience of college and university clericals. There are at least 13 different national unions with collective bargaining agreements covering campus clerical workers. Two of the three faculty unions, the AFT and the NEA, have established clerical divisions which have a fair number of units in higher education. These clerical units are often established on campuses where the parent union also represents the faculty — thus the AFT has separate units for faculty and clericals at the Vermont State Colleges, and similarly for the NEA at Youngstown State in Ohio.

Unions with a primary jurisdiction among government employees have also organized many clericals at public educational institutions with AFSCME leading the way. On the other hand, the only major union to specialize in organizing private sector office employees, the OPEIU, also has been active with at least 15 campus units in the greater New York City area alone. The clerical divisions of other unions are also involved, especially SEIU District 925 and UAW District 65. But even within these two unions, there is no clear jurisdictional integrity. Thus, while District 925 represents clericals at five institutions, various locals of SEIU have organized units at more than 20 others. And while District 65 has organized clericals at several universities in the Northeast, the UAW proper represents units close to home at Wayne State and Northern Michigan. Other unions with no clear jurisdictional interest have succeeded in organizing college and university clericals, particularly in those geographic areas where they have a strong membership base. Thus, the CWA represents units at the New Jersey State colleges, the Hotel Employees have units in Connecticut at Yale and Quinnipiac College, the Teamsters have a local at the University of Chicago, and the Hospital and Health Care union negotiates for Temple's office employees.

This crazy quilt of union activity among college and university clericals perhaps best reflects an observation made earlier. These workers are most comfortable with a union controlled at the local level, and thus, the parent organization is largely irrelevant. From their perspective, the union is defined as the organizer and the local organizing committee. A strong local reputation for a specific union is apparently more important in most campaigns than any image associated with the national union. Ironically, the first known clerical unit on campus was established in 1946 at the Center for Degree Studies, a junior college and correspondence school in Scranton, Pennsylvania, by the strongest union in the state — the United Steelworkers. Forty-three years later the Steelworkers are at it again, now attempting to organize clericals at Pennsylvania State University.

ANALYSIS OF ORGANIZING CAMPAIGNS IN HIGHER EDUCATION

In the spring of 1986, a survey was distributed to the personnel administrators at the 100 largest public and the 50 largest private universities in the United States, and to their counterparts at the 142 accredited four-year colleges and universities in New England. Repeated mailings and follow-up telephone interviews secured completed surveys for all 150 institutions in the national sample, and for 141 of the 142 schools in the New England sample. Descriptive data from the national sample were reported and interpreted a year and a half ago in an issue of the NCSCBHEP *Newsletter*.[4] Subsequently, the information gathered from the New England survey was combined with data available from other sources and subjected to statistical analysis. Detailed econometric testing was performed on a subset of the sample consisting of New England's 124 four-year colleges and universities with a 1986 enrollment of 500 or more. The results of these tests ae summarized in Table 3 and discussed below.

Student enrollment was entered as a proxy for the size of the potential clerical unit. Although this variable has no impact on clerical organizing success, estimation of a separate equation revealed that larger universities do attract more organizing activity. Apparently, unions have targeted campaigns based on the size of the unit without strict attention to organizing potential. As expected, clerical organizing is more successful at public universities than at private universities, likely for the reasons explained in the summary of the organizer interviews above. Likewise, the state unionization level has the expected positive effect on success, undoubtedly reflecting a higher level of familiarity with unions.

The presence of a faculty union has a significant positive influence on clerical organizing success. The magnitude of the impact is surprising, with the likelihood of clerical organizing success increasing by 64% where the faculty agent is the AFT (in comparison to "no-agent", *ceteris paribus*), by 52% where the agent is the NEA, and by 41% where the agent is the AAUP. The declining order of magnitude is consistent with the three faculty unions' respective degree of integration into the broader labor movement and, therefore, the level of support they would likely offer to the organizing efforts of other workers.[5] The degree of magnitude may be a bit misleading as the variables are likely capturing two separate factors — although the prior existence of a faculty union undoubtedly provides a supportive environment for clerical unionization, it may also reflect difficult conditions on campus which are conducive to the unionization of all workers. Estimation of a series of additional equations revealed that the two factors are roughly equal in their effect; they also demonstrated that the prior existence of a clerical union has no impact on faculty organizing.

Universities are defined as "status" institutions if they have selective admissions standards and confer doctoral degrees. Thus, this variable measures the status of some institutions relative to others, rather than the prestige of university employment relative to other clerical jobs. The magnitude of the impact of status on clerical organizing is also rather astonishing — among four-year colleges the likelihood of success increases by 40% at colleges and universities qualifying for the status designation (*certeris paribus*). This result lends credence to those organizers who argue that prestige can be used as an issue in representation campaigns. Status institutions typically attract better educated, more highly skilled clericals who thrive on the challenges they face working with with professionally active scholars. Unionization is an avenue for them to seek recognition and respect for their contributions to the academic community.

On a related point, those organizers who perceive prestige as a barrier may be confusing the status issue with the impact of faculty unions. Status has a significant negative impact on faculty organizing efforts. This lack of faculty support for unions may well be an impediment to clerical organizing success. The results reported in Table 3 indicate that among campuses with identical faculty

TABLE 3

ENVIRONMENTAL VARIABLES WHICH SIGNIFICANTLY AFFECT ORGANIZING SUCCESS AMONG CLERICALS IN HIGHER EDUCATION

	Estimated Effect on Likelihood of Organizing Success of a One Point Change in Observed Variable *
Positive Impact	
Public Sector Institution	.28
State Unionization Level	.07
Status of Institution	.40
Presence of Faculty Union:	
AFT	.64
NEA	.52
AAUP	.41
No Impact	
Enrollment	

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* The estimated effects are based on the assumption that all other factors are held constant. Six of the seven variables are dummies so a one point change is from 0 to 1. Only state unionization level is measured as a percentage, so for that variable a one _percentage_ point change would have the estimated impact.

Source: Richard W. Hurd and Adrienne McElwain, "Organizing Activity Among University Clerical Workers," Industrial Relations Research Association, _Proceedings of the Forty-First Annual Meeting_ (December 28-30, 1988).

bargaining agents (or absence thereof), institutions with the status designation should offer more fertile ground for clerical organizing.

RECENT DEVELOPMENTS

Union representation of college and university clerical employees continues to expand. There were three notable union victories in 1988: at Harvard University, 3400 clerical and technical employees selected AFSCME as their bargaining agent, at the University of Cincinnati, 1200 clericals chose the SEIU as their representative, and at Adelphi University in New York, 275 clericals elected OPEIU Local 153. These three victories share a common evolution. At Harvard, clerical organizing history spans two decades, including two defeats for District 65 in representation elections among medical school employees in 1977 and 1981. The lead organizer for AFSCME at Harvard, Kristine Rondeau, was involved in both of those earlier efforts, as an employee in 1977 and as a UAW District 65 organizer in 1981. At the University of Cincinnati, the campaign by SEIU District 925 began in 1984 and included a representation election loss in 1986. The OPEIU victory at Adelphi University culminated a twelve year effort marked by previous election defeats in 1977 and 1982. It is not uncommon for a union to lose a first election, maintain a presence, then eventually win bargaining rights. This scenario is especially likely where the university administration aggressively opposes unionization and where the union relies on the grass-roots mass participation approach to organizing.

Although precise estimates are impossible, the available evidence indicates that total union membership among clerical workers in higher education is now roughly equal to faculty union membership. In the private sector, clerical employees have apparently surpassed faculty in the extent of unionization. With evidence from the New England survey, it is possible to make reasonable estimates of the degree of unionization among clerical workers at the region's four-year colleges and universities. Nearly 20% of clerical employees at private institutions and about 80% of those at public institutions are represented by unions. These figures compare to unionization levels of 11% in the private sector and 61% in the public sector for the region's total labor force. From the national survey, similar estimates of unionization at the nation's large four-year colleges and universities are possible.[6] About 25% of clerical employees at private institutions and nearly 40% of those at public institutions are represented by unions. These figures compare to unionization levels of 16% in the private sector and 43% in the public sector for the nation's total labor force. The comparable national figures for faculty are 5% in the private sector and 37% in the public sector.

These estimates of clerical unionization should be interpreted with caution for at least two reasons. First, unions have targeted large universities for organizing, so levels of union representation among clericals at these schools probably exceed levels at smaller institutions. Second, New England has experienced a disproportionate share of clerical organizing generally and higher education organizing specifically. There are vast areas of the country with very little evidence of clerical unionization in higher education, particularly the south (except Florida) and the west (except the three Pacific coast states).

Although fear of strikes hampers organizing activity among clericals, once unionized, this reticence towards direct confrontation seems to dissipate. In 1988, there were three major strikes among university clericals: a five-week strike by a UAW local at Wayne State University in Detroit (their fourth strike in eleven years), a three-week strike by an AFT local at New York University, and a two-week strike by an independent local at Michigan State University. Estimates of strike activity of unionized clerical workers are compared with data on faculty strike activity in Table 4. Although the evidence on clerical strikes is

TABLE 4

STRIKE ACTIVITY IN HIGHER EDUCATION

	Percentage of Union Members on Strike Annual Averages	
	1970-84	1980-84
U.S. faculty (all colleges and universities) *	2.33	1.32
Estimated U.S. clericals (large colleges and universities)	3.96	2.04
Estimated New England clericals (four year colleges and universities)	9.30	7.99

* Source: William Aussieker, "The Changing Pattern of Faculty Strikes in Higher Education," Journal of Collective Negotiations in the Public Sector, 1985, v. 14, pp. 349-357.

based on two non-representative samples rather than the total population, by all indications, university and college clerical employees are more likely to strike than their unionized faculty counterparts. Strike activity in the last two years has exceeded the levels reported in Table 4 with an estimated 4.75% of unionized clericals at large national colleges and universities involved in strikes in 1987 and 7.77% in 1988. To put these figures into perspective, 4.4% of all unionized workers in the U.S. were involved in strikes or lockouts in 1981, the last year for which data are available. Although the exact level of strike activity in subsequent years is unknown, the number of strikes involving 1000 workers or more has declined substantially during the 1980s. By all indications, then, in recent years clericals in higher education have been at least as likely to stage a work stoppage as unionized employees generally.

The increasing importance of pay equity is apparent in various aspects of the activity of clerical unions in higher education. The 1988 strike at Michigan State resulted, in part, from disagreement over implementation of a classification study with direct comparable worth implications. The successful 1988 organizing campaign at the University of Cincinnati by SEIU District 925 focused on sex-based wage discrimination. Also in 1988, the Maine NEA affiliate successfully capped a five-year legislative campaign which included a job evaluation study conducted with the assistance of the National Committee on Pay Equity, and eventual state funding for pay adjustments for clerical and professional employees of the University of Maine System. The issue of pay equity has become the order of the day with some attention to it in most organizing campaigns and many collective bargaining agreements.

In spite of recent victories and increased militance, a number of factors point to a decline in the rate of growth in union membership among these workers. The continuing decline in unionization elsewhere in the economy and the stagnation in union membership among faculty both point to a less supportive environment for current and future organizing campaigns. Increased management opposition will present another formidable impediment to organization in both the private and public sectors. Furthermore, parent unions are reducing their subsidies to clerical worker organizing, and the pressure to become self-sufficient will likely force clerical divisions to reduce their organizing efforts and concentrate on servicing existing units. To assist established locals in their bargaining activities, several national unions have formed coordinating committees for their university and college clerical units. These committees will facilitate the spread of innovative contract agreements particularly, in the area of job evaluation studies and pay equity.

FOOTNOTES

1. See Richard W. Hurd, "Bottom-Up Organizing: HERE in New Haven and Boston," Labor Research Review, Spring 1986, v. 8, pp. 5-20; and Richard W. Hurd, "Learning from Clerical Unions: Two Cases of Organizing Success," Labor Studies Journal, Spring 1989, v. 14, pp. 30-51.

2. Richard W. Hurd and Adrienne McElwain, "Organizing Clerical Workers: Determinants of Success," Industrial and Labor Relations Review, April 1988, v. 41, pp. 360-373.

3. Cheryl Maranto and Jack Fiorito, "The Effect of Union Characteristics on the Outcome of NLRB Certification Elections," Industrial and Labor Relations Review, January 1987, v. 40, pp. 225-240.

4. Richard W. Hurd and Gregory Woodhead, "The Unionization of Clerical Workers at Large U.S. Universities and Colleges," Newsletter, National Center for

the Study of Collective Bargaining in Higher Education and the Professions, v. 15, no. 3, July/August 1987.

5. Similar equations were estimated for the national sample and the order of magnitude of (significant) coefficients was identical — AFT, NEA, AAUP.

6. Because of clear geographic bias in the sampling of two-year colleges, estimates of the degree of unionization of clericals at these institutions would be quite misleading and thus are omitted.

NEW DIRECTIONS IN COLLECTIVE BARGAINING

C. CLERICAL AND TECHNICAL UNIONS: THE CASE OF NEW YORK UNIVERSITY

Margarita Aguilar, President
United Staff Association
New York University

I am President of Local 3882, affiliated with the New York State United Teachers (NYSUT) and the American Federation of Teachers (AFT), representing the 1,500 clerical and technical workers at New York University. Our unit is 70% female and 50% Black and Hispanic. We are, I believe, one of the earliest private universities to have organized. We are the oldest at this table, although most of the success of university organizing comes from work which began at least 20 years ago.

I am going to talk about my local's fight to achieve a legitimate voice on campus and in our union. My local's history has been one in which our employer has made the legitimacy of our organization as difficult as possible. We have survived for 10 years as an organization in an open shop environment where one-third of the workforce, approximately 500 people, turnover every year. Just to maintain majority has meant that we have recruited almost 3,000 people in 10 years.

THE STRIKE — SELECTED ISSUES

Our membership went on strike this summer over three main issues: NYU's attempt to impose a three year contract and deny the union real negotiations, the issue of pay equity and the right to have a strong and stable organization through an agency shop provision. After three weeks of striking, we proved that NYU could not just impose a contract, we moved the university in terms of our pay, achieving additional pay for two-thirds of our bargaining unit, but we could not move the university on an agency shop, in any manner.

The university resisted pressure from NYSUT and the AFT and our political allies. The university allowed a strike to go on for three weeks and the repercussions of that strike are still being felt today. They allowed their students and faculty to suffer in order not to allow the staff's organization the legitimacy and stability we have a right to.

1) Agency Shop

I believe that the university's Board of Trustees are in a war of attrition with us. We have a Board chaired by Laurence Tisch of the Columbia

Broadcasting System. They are hoping that the turnover eventually exhausts the union and that our effectiveness will decline. They know how difficult it is to bring in a shop once the local is established. Before the strike, we did a survey of our members and nonmembers to better understand what issues were important to the staff and why nonmembers had not joined. The biggest criticism from members was a lack of unity, and, I believe, they were addressing the "free riders" and, interestingly enough, most nonmembers expressed good will towards the union and thought we were doing a good job. They just did not want to give up the $15 a month.

2) Lack of Resources

Additionally, our recruiting and the important work of maintaining the organization, protecting and defending our members has been done with only one full-time organizer. Again, we cover 1,500 people in six metropolitan locations in over 70 different buildings. Although in ten years we have increased salaries by 110% and have, for instance, improved the pension by 46%, brought in a dental plan and strengthened job security, we have not been able to achieve any release time for union work our shop stewards or our officers for contract negotiations, to investigate grievances, to meet or to attend to union related business.

3) The University President

John Brademas, who was known as a "friend of labor" in his long and distinguished career as a Congressman from Indiana has been president of NYU for the past eight years, throughout most of the life of this union. Not once has Brademas agreed to meet with a union representative. He has not even directly answered any correspondence with the union. All correspondence with university officials is routed to the director of labor relations.

4) Employee/Membership Turnover

We have been caught in a difficult situation because of the turnover and the open shop. We have to recognize that in an unstable workforce, (the majority of whom have been at NYU three years or less, many of whom are leaving or thinking of leaving because of low salaries) it is difficult to cultivate a commitment to a union when there is no commitment to a job. We have always had to stress wages in negotiations, usually over union rights, in order to motivate the membership to fight. Of course, if we had largely the same workforce involved in the next negotiations, and I mean the people who struck, the issue of union rights would be out in front with no difficulty. But, with the turnover, most of the staff in the next negotiations will be new.

Of course, NYU benefits from the turnover, not only in that it makes the union weaker but, it also saves them money. A changing workforce does not accrue seniority or benefits. Fortunately for us, individuals recognize that the institution is indifferent and even callous towards them and that they need a collective voice. And, through a lot of hard work, we have always managed to maintain a majority of such individuals. For 10 years, the clerks have managed to achieve a collective voice in decisions affecting their working lives.

Someone from our union approaches every new person hired by NYU, which number almost 50 per month. It is through these personal contacts that people join. We have a group of 60 or so activists who can be called on to talk to new hires.

And, although it is a difficult situation, there are benefits to having the leadership all be full-time NYU employees. We do not have to keep in touch with the members, we work next to them. It is always easier to recruit a member when you work beside them.

NYU itself, has never cultivated a sense of collegiality amongst any of its bodies (administrators, faculty or students) and is most often characterized as being a cold and indifferent institution — mainly interested in selling its image and name. In fact, the AFT had been looking to organize faculty during the mid to late 1970's, unsuccessfully, and in the wake of the Yeshiva court decision, ended its efforts.

LACK OF SUPPORT

Unfortunately for staff organizing, this lack of collective action by students and faculty has often led to a lack of widespread and organized support for our endeavors. During our last contract negotiations, we had to recognize that with our limited resources, we could not nurture their support as well as we would have liked to, but we did spend time in the Spring semester before our strike, working to build interest amongst faculty and students. Our strike deadline also made this support work more difficult since faculty and students were off campus for the summer when our crucial strike mobilization period occurred.

During our last negotiations, we also spent a lot of time discussing the effect the constant turnover has on all the different constituencies of NYU. We know that both students and faculty suffer when often the staff they encounter have only been working at the university a year or less and when they finally achieve some experience, they move on. This issue of the impact of the staff's tremendous turnover on the entire university did gain us support amongst students and faculty. And, when we explained a major reason for the turnover was that secretaries at NYU made $2,000 a year less than the porters, security guards and elevator operators, they understood the issue of pay equity.

FACULTY SUPPORT FOR NON-FACULTY UNIONS

However, no real support activity occurred by faculty until they returned to campus in the fall and we were already on strike. During our strike, we received support from hundreds of faculty members and students.

Hundreds of classes were moved off campus and students and faculty each had separate demonstrations on our behalf. This support was crucial, especially in terms of media coverage. Because they were university faculty (or more important people than just a bunch of secretaries and clerks) and students (or more colorful than clerks), the press highlighted their actions and responses to the strike.

Although our members and the university were both moved, to a degree, by the number of faculty holding classes off campus, I am mixed about this tactic. As difficult as it is to pin down the product of a university — teachers instructing students is clearly the institution's purpose. By helping to move classes — in solidarity — we were allowing business to go on. This tactic may have prolonged our strike, although, it won us goodwill and did manage to be disruptive. If students were not being taught, a more severe climate would have occurred sooner.

Of course, the students' anger would have also been directed at the strikers and here is where the difficulty comes in. Because we were largely female strikers — would that anger, directed at them, have paid off, or would it have been detrimental to the strikers themselves. After weeks and weeks of being on strike, the union declared a three-day moratorium in November during which "no business as usual" was the goal and it was at this point that the angriest confrontations between staff and their supporters occurred.

Because striking is a new idea to office workers and university workers, we encountered many unique situations which I do not think occur in other settings. For example, we encountered liberal faculty who proposed to their secretaries that they take their work home and, in that way, they would not be crossing a picket line.

A LOOK AHEAD: EXISTING PROBLEMS

Many of the issues confronting the organization of clerical workers on campus evolved because of the class relationships on campus and the sexism inevitably found when the overwhelming majority of a group of workers are women.

Secretaries and clerks are, for the most part, invisible workers. Faculty often have conversations across a secretary's desk, as if she did not exist, or enter a room with only a secretary in view and exclaim that no one is in. Because faculty work is thought of as more important than secretarial work, faculty are often oblivious to the demands they put upon secretaries. Because the stress and strains put on secretaies are more subtle than blue-collar workers, their work seems more genteel, less difficult intellectually and physically. Therefore, their complaints are taken less seriously and their demands also.

The same reasoning that makes it possible for a supervisor to ask a secretary to clean up after a meeting, is what can allow fellow members in the same union to treat the clerical workers less seriously. But, whatever the difficulties of having faculty and staff in the same union, there is one overriding reason why it is beneficial — power. Even though we will encounter classism and sexism in these situations, it is always better to be working together. I would rather deal with our problems and fellow union members as equals. Among the clerical workers I have talked to, those in the same bargaining unit as faculty usually have the stronger contract. However, I think this relationship has to be entered into with open eyes and the local has to be set up so as to insure the democratic participation of clericals. It is as important for us to fight for a legitimate voice in our unions as it is in the workplace. Because it is far too easy for us to allow men, or those with more education, to assume responsibility for us.

We are not in a situation where we are in a same local as faculty, but we are in a state and national organization which was principally set up for teachers and the membership is overwhelmingly teachers. I know that non-faculty can feel like second class members. I believe that NYSUT and the AFT are taking steps to empower their non-faculty members but ultimately, as we become more sophisticated in our trade unionism, it must be the clerks and secretaries who must make the fight for a legitimate voice.

III. COLLECTIVE BARGAINING AND THE LAW

A. Collective Bargaining and the Law: The Annual Update
B. The Duty of Fair Representation
C. Steps for Complying with Agency Fee Requirements: A Practical Guide for Unions
D. Union Security in New York State's Public Sector

COLLECTIVE BARGAINING AND THE LAW

A. COLLECTIVE BARGAINING AND THE LAW: THE ANNUAL UPDATE

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I. INTRODUCTION

This update is not intended to list or summarize all cases decided in the past year that impact on collective bargaining in higher education. Rather, this update discusses only some of the recent cases that the author thought were illustrative of current legal issues in higher education, both in and out of the collective bargaining context.

II. THE YESHIVA ISSUE

A. The Private Sector

NLRB v. Yeshiva University, 440 U.S. 672, 103 LRRM 2526 (1980) is still good law. In 1987, Yeshiva was applied by the federal courts in cases involving Boston University (BU) and Florida Memorial College. In Boston University Chapter, American Association of University Professors v. NLRB, 281 NLRB No. 115, 123 LRRM 1144 (1986), enforced 835 F.2d 399, 127 LRRM 2193 (1st Cir. 1987), the United States Court of Appeals for the First Circuit affirmed a decision of the National Labor Relations Board (NLRB) that faculty members at BU were managerial employees. The faculty had absolute authority over such matters as grading, teaching methods, graduation requirements and student discipline. In addition, the faculty was the primary force and almost always controlled matriculation requirements, curriculum, academic calendars and course schedules. Furthermore, the faculty effectively determined faculty hiring, tenure, promotions and reappointments which included the authority to veto curriculum and personnel decisions. Despite the fact that the ultimate authority for decision-making at BU rested with the President and Board of Trustees, and that, on occasion, the administration implemented policy decisions without faculty input, in practice, faculty decisions on the policy matters noted above were effectuated in the great majority of cases.

In Florida Memorial College, 263 NLRB No. 160, 111 LRRM 1547 (1982), enforced, 820 F.2d 1182, 125 LRRM 3065 (11th Cir. 1987), the NLRB found the faculty to be non-managerial and, therefore, entitled to bargain collectively. That decision was based on the broad and nearly unilateral power of the academic dean which left the faculty with only minimal decision-making authority. Recommendations of various faculty committees were not treated as binding. For example, the NLRB found that the faculty possessed no authority over curriculum, admissions, student academic standards, teaching loads, hiring, promotion, tenure, grievances, sabbaticals, salaries, terminations, the budget or development of new campuses. The faculty's limited involvement in course content, teaching methods and student evaluation was deemed insufficient to make the faculty managerial under the principles of Yeshiva. The NLRB characterized the role of the faculty at Florida Memorial College as one of offering suggestions to which no systematic deference was afforded by the college administration.

In University of Dubuque, 289 NLRB No. 34, 128 LRRM 1259 (1988), the University had been engaged in collective bargaining with the faculty since 1973. In 1983, the University sought to have the faculty declared managerial under the principles of Yeshiva. The faculty at the University has the exclusive right to set student grading and classroom conduct standards, set degree requirements, recommend earned degree recipients, consider new degree programs, and develop, recommend and approve the curriculum. Additionally, the faculty has the right to recommend admission standards and departmental staffing needs. All of the above faculty rights were guaranteed in the collective bargaining agreement. Dubuque is the second case to rely, at least in part, on faculty rights achieved and maintained through collective bargaining. See, also, College of Osteopathic Medicine and Surgery, 265 NLRB No. 37, 111 LRRM 1523 (1982). The faculty at Dubuque also has significant input in the areas of student standing and financial aid policies and distribution. The faculty also participates in formulating and effectuating policy in the following non-academic areas: budget matters, capital improvements, department staffing needs, long-range planning, faculty contract renewals, promotion and tenure decisions, selection of dean and chairpersons, granting of leaves and distribution of funds for faculty development. The NLRB concluded that the faculty at the University has significant authority and makes effective recommendations in areas that the Supreme Court described as managerial in Yeshiva and, therefore, faculty members at the University of Dubuque are managerial employees.

More recently, the United States Court of Appeals for the Sixth Circuit enforced an order of the NLRB requiring the Kendall School of Design to bargain with its faculty union. Kendall School of Design v. NLRB, 279 NLRB No. 42, 122 LRRM 1177 (1986), enforced, 866 F.2d 157, 130 LRRM 237 (6th Cir. 1989). The faculty at the Kendall School of Design has little actual authority in the academic areas of determining curriculum, grading systems, admissions and matriculation requirements, academic calendars, size of student body and tuition. Nor does the faculty have significant authority in the areas of budgeting, site selection, faculty personnel actions and sabbaticals. Rather, the faculty's authority is limited to those professional duties discharged in the performance of assigned tasks. The discharge of professional duties on projects to which one has been assigned does not make one a managerial employee under the Yeshiva decision.

In Dean Academy and Junior College and Dean Faculty Federation, Case No. 1-RC-18, 952, NLRB, First Region (Regional Director's Decision, 9/1/88), it was determined that full-time junior college faculty were managerial employees under Yeshiva, but that a bargaining unit of part-time faculty was appropriate.

B. The Public Sector

There has been little activity in the public sector on the Yeshiva issue. Public sector bargaining is governed by public employee bargaining statutes in the various states and, in some cases, by state constitutional provisions.

There is an ongoing *Yeshiva* dispute at the University of Pittsburgh. In 1984, a petition for representation was filed by the faculty under the Pennsylvania Public Employee Relations Act. The faculty and the University entered into a lengthy stipulation of facts concerning faculty participation in institutional governance. The parties agreed, further, that the faculty at the University shared in its governance in a fashion comparable to those faculties found to be managerial in *Yeshiva*. The issue submitted to the Pennsylvania Labor Relations Board was whether such sharing in the University's governance confers managerial status upon the faculty so as to exclude faculty members from coverage under Pennsylvania's labor statute. A hearing examiner concluded that the tenured, tenure-stream and full-time non-tenure-stream faculty were managerial employees, but that full-time and part-time librarians and non-tenure stream part-time faculty were not managerial employees. *University of Pittsburgh*, 19 PPER 216 (par. 18077 H.Ex. 1987). The parties subsequently agreed to exclude librarians from the proposed bargaining unit. The election process was completed last month with a vote in favor of representation. An appeal is now expected on the issue of whether the faculty is excluded from coverage under the statute.

A *Yeshiva*-type dispute has arisen over whether certain positions at Sangamon State University in Illinois are included in the faculty bargaining unit under the Illinois Educational Labor Relations Act. *Board of Regents v. Illinois Labor Relations Board*, 166 Ill.App.3d 730, 520 N.E.2d 1150 (Ill.App. 4 Dist. 1988). The Illinois statute excludes from coverage managerial employees who engage "predominantly in executive and management functions and (who are) charged with the responsibility of directing the effectuation of such management policies and practices." At issue are directors of various centers that are charged with the development of applied research and service activities which address problems of state and local significance (e.g., Center for Legal Studies, Center for Policy Studies). The center directors are tenured faculty members whose positions are considered administrative. The directors are responsible for day-to-day operation of the centers, for recommending faculty staffing of the centers, for determining whether proposed faculty projects further the mission and goals of the centers and for supervising faculty of the centers. The directors also have some responsibility in connection with the solicitation and administration of grants. The Court concluded that the responsibilities of the center directors were more managerial than those of the faculty in *Yeshiva* and held that the center directors were managerial employees under the Illinois statute. The Court noted that despite their faculty status it was inappropriate to put the directors in a position where they would have divided loyalties between the administration and the faculty's exclusive bargaining representative.

III. ACCESS TO RECORDS AND INFORMATION

The author detects more and more cases raising issues about the availability of records and information in academia. These issues can arise in many contexts and, not infrequently, involve requests of faculty unions. Some regard information requests in academia as fostering accountability and fairness in decision-making. Others regard such requests as intrusive and as impeding the quality of decision-making in academia.

A. Duty of Employer in Collective Bargaining Relationship to Provide Information to Union

An employer's statutory duty to supply information requested by a union in the public sector follows private sector precedent under the National Labor Relations Act (NLRA). See, e.g., *Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board*, 527 A.2d 1097 (Pa.Cmwlth. 1987) (public employer has statutory obligation to provide union with information pertaining to grievant's evaluation, grievances of non-unit employees and work schedules to enable it to determine whether to pursue grievance). Accord, Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 541 A.2d 1168 (Pa.Cmwlth. 1988) (employer required to reveal to union identity of witnesses who had given statements against suspended grievant).

The duty to furnish information requires that an employer furnish both relevant information during contract negotiations, NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956), and during the term of the agreement, NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). See, also, NLRB v. United States Postal Service, 841 F.2d 141 (6th Cir. 1988) (employer required to produce to union names of union officials who had applied for supervisory positions; Federal Privacy Act does not protect from disclosure agency records required to be produced under statutory duty to provide information); New Jersey Department of Higher Education, 13 NJPER 254 (par. 18104 H. Ex.), aff'd. 13 NJPER 504 (par. 18187 PERC 1987) (unfair practice complaint dismissed where Department of Higher Education refused to provide union with correspondence between the Chancellor of Higher Education and Salary Adjustment Committee where union had been orally informed of the substance of the correspondence); Union County College, 14 NJPER 453 (par. 19188 PERC, 1988) (College fulfilled its statutory duty to supply information to faculty union concerning promotion denials by producing list of faculty members who had applied for promotion, disposition of applications, results of appeals process, copies of denial letters, and procedures and criteria employed in promotion process); California State University, 9 NJPER par. 18051 (CA.PERB 1987) (University violated duty to meet and confer in good faith by refusing to provide faculty union with copy of comparative wage survey in unredacted form).

Information may be protected from disclosure if it is confidential. Detroit Edison v. NLRB, 440 U.S. 301 (1979) (claim of confidentiality upheld where union sought information about employee aptitude tests).

B. Information Requests During Litigation

1. Unfair Labor Practice Litigation:

A discovery dispute arose during the pendency of unfair practice charges arising out of a teacher strike in Illinois. Illinois Educational Labor Board v. Homer Community Consolidated School District No. 208, 160 Ill.App.3d 730, 112 Ill. Dec. 802, 514 N.E.2d 465 (Ill.App. 4th Dist. 1987), appeal allowed, 520 N.E.2d 385 (1988). The union sought the following from the school district: the district's bargaining notes, notes made by the district on union bargaining proposals, documents relating to bargaining strategies, documents relating to strike plans, and other documents relating to bargaining, grievances and unit members. The union argued that the information was relevant to whether the school district had engaged in an unfair labor practice. The school district, on the other hand, argued that materials pertaining to collective bargaining were confidential, that the information sought was exempt from disclosure under the state Freedom of Information Act and that, under the state Open Public Meetings Act, the school district was permitted to keep discussions about collective bargaining confidential. The court adopted a qualified privilege in reliance on EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983) (qualified academic freedom privilege recognized protecting academic institutions against disclosure of names and identities of peer review participants). The Illinois court remanded the dispute to a lower court for a hearing and in camera inspection of documents and witnesses. The court instructed the lower court to determine whether the probative value of the information sought outweighed the need for confidentiality.[1]

2. Grievance Litigation:
In *Ollie v. Highland School District No. 203*, 50 Wash.App. 639, 749 P.2d 757 (Wash.App. 1988), a discharged school employee brought a grievance and, on *de novo* review in court, subpoenaed personnel evaluations of other school employees. The court found that personnel evaluations were not privileged under the Washington Public Records Act and were relevant to the employee's claim. The court, however, did permit *in camera* inspection of the files and redaction of information the release of which would constitute an invasion of privacy.

3. Faculty Handbook Litigation:
In *Moffie v. Oglethorpe University*, 186 Ga.App. 328, 367 S.E.2d 112, (Ga.App. 1988), a faculty member was denied tenure, commenced suit and alleged, *inter alia*, that the faculty handbook required that the University provide him with supportive data for the decision denying tenure. The Court decided that plaintiff's contention might be correct but that no damages could arise from such a breach.

C. Statutory and Common Law Rights of Access

Information requests have been brought by individuals and unions against public institutions under state freedom of information laws and the common laws of the various states. Also listed below are union requests for information under the Federal Freedom of Information Act (FOIA).

1. Individual Requests

a. *Pennsylvania State University v. Department of Labor and Industry*, 536 A.2d 852 (Pa.Cmwlth. 1988), appeal denied, 546 A.2d 623 (Pa. 1988) (peer review evaluations were "performance evaluations" rather than "letters of reference," and were, therefore, available for inspection by employee under state statute permitting employees access to their personnel files); Accord *Lafayette College v. Department of Labor*, 546 A.2d 126 (Pa.Cmwlth. 1988).

b. *Hovet v. Hebron Public School District*, 419 N.W.2d 189 (N.D. 1988) (teacher's personnel file is a public record under state Constitution and statute and is available for inspection by member of public).

c. *Klein Independent School District v. Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. den.*, 108 S.Ct. 1473 (1988) (release of teacher's college transcript under state Open Records Act did not violate Family Educational Rights and Privacy Act of 1974 or right to privacy).

d. *Spinelli v. Immanuel Lutheran Evangelical Congregation*, 118 Ill.2d 389, 113 Ill.Dec. 915, 515 N.E.2d 1222 (Ill. 1987) (Illinois statute permitting employees access to their personnel files declared unconstitutional on account of vagueness in that employers could not determine from language of statute which personnel documents were subject to disclosure).

2. Union Request

a. *State Employees Association v. Department of Management and Budget*, 428 Mich. 104, 404 N.W.2d 606 (Mich. 1987) (union entitled to state employees' home addresses under Michigan Freedom of Information Act; Court noted that identity of requestor and purpose for which information will be used is not relevant under statute).

3. Union Requests under Federal FOIA

a. U.S. Department of Air Force v. Federal Labor Relations Authority, 838 F.2d 229 (7th Cir. 1988) (Freedom of Information Act and statutory duty to supply information require disclosure to union of home addresses of non-members); Accord U.S. Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131 (3d Cir. 1988), cert. dismissed, 102 L.Ed.2d 170 (1988) (Freedom of Information Act and statutory duty to supply information require disclosure to union of names and home addresses of bargaining unit members); Compare Agriculture Department v. Federal Labor Relations Authority, 836 F.2d 1139 (8th Cir. 1988) (Union entitled to names and home addresses of bargaining unit members except where individual has asked that information be kept confidential), vacated, 102 L.Ed.2d 964 (1989).

b. Local 3, International Brotherhood of Electrical Workers v. National Labor Relations Board, 845 F.2d 1177 (2d Cir. 1988) (Union seeking to represent employees not entitled to employees' names and addresses under Freedom of Information Act).

c. International Brotherhood of Electrical Workers, Local Union No. 5 v. U.S. Dept. of HUD, 852 F.2d 87 (3d Cir. 1988) (Union entitled to names and addresses, but not social security numbers, of non-union employees of subcontractor under Freedom of Information Act).

4. Open Public Meeting Act Cases

a. Minnesota Daily v. University of Minnesota, 432 N.W.2d 189 (Minn.App. 1988), review denied, 1/25/89 (Presidential Search Advisory Committee not subject to Minnesota Open Meeting Law).

b. Council of N.J. State College Locals v. N.J. State College Governing Boards Association, 226 N.J. Super. 556, 545 A.2d 504 (App.Div. 1988) (statutorily created Association whose members are state colleges is a "public body" covered by Open Public Meetings Act).

D. Academic Freedom Privilege

One of the most serious assaults (from the viewpoint of colleges and universities) on academic decision-making is the demand for confidential peer review material. An "academic freedom privilege" based upon First Amendment Constitutional grounds has been raised by colleges and universities across the country in discrimination and civil rights lawsuits in an effort to protect evaluative material sought to be discovered by federal and state investigative agencies and by individual plaintiffs. This evaluative material usually consist of written evaluations conducted by one's peers as well as external letters of evaluation solicited with the promise of confidentiality. The material can concern the litigant as well as other faculty members to whom the litigant wishes to compare him/herself.[2]

1. Federal Court

The most significant development in this area involves the University of Pennsylvania and the Equal Employment Opportunity Commission. Pursuant to its investigation of charges of sex and national origin discrimination arising out of the University's failure to tenure the charging party, the EEOC issued a supoena duces tecum seeking confidential peer review materials. The University, in an effort to escape the effect of EEOC v. Franklin and Marshall, commenced suit in the United States District

Court for the District of Columbia seeking to quash the subpoena. Approximately six weeks after the University commenced suit in the District of Columbia, the EEOC filed an action in the United States District Court in the Eastern District of Pennsylvania to enforce its subpoena. The University moved to dismiss this subpoena enforcement action. The Court denied the University's motion to dismiss and enforced the EEOC's subpoena. The United States Court of Appeals for the Third Circuit, relying upon EEOC v. Franklin and Marshall, enforced the subpoena. EEOC v. University of Pennsylvania, 850 F.2d 969 (3d Cir. 1988). The University filed a Petition for Writ of Certiorari with the United States Supreme Court. The first issue raised by the University was whether the EEOC could compel the disclosure of confidential academic peer review materials without affording any consideration to the First Amendment interests at stake.

The second issue raised was whether the U.S. District Court for the Eastern District of Pennsylvania should have dismissed the EEOC's enforcement action in favor of the University's previously filed action in the District of Columbia. Initially, the Supreme Court granted certiorari on the second issue only. 109 S.Ct. 554 (1988). On April 7, 1989, the Supreme Court abruptly changed its mind by dismissing certiorari on the second issue and granting certiorari on the academic peer review issue. The Supreme Court's decision in this case may resolve the conflict in the federal courts on this issue and, since the First Amendment applies to the states, may impact on state agencies that investigate employment discrimination.

2. State Court

The author is aware of only one decision from the highest court of a state that addresses the academic freedom privilege in the context of a state agency's investigation of discrimination. In Dixon v. Rutgers, 110 N.J. 432, 541 A.2d 1046 (1988), plaintiff alleged that she had been denied promotion on account of her sex in violation of the New Jersey Law Against Discrimination. During the investigation by the New Jersey Division on Civil Rights, the University had produced to the Division promotion packets of certain male faculty members who had been promoted. This production was with the understanding that the material would not be made available to the plaintiff. The promotion packets included materials submitted by the candidates in support of their applications, peer review evaluations and letters of evaluation from individuals outside the University which had been solicited with the promise of confidentiality. The Division issued a Finding of Probable Cause. Rutgers moved before trial to suppress the confidential material involving the other faculty members as well as the external confidential letters of evaluation of plaintiff. The University argued, inter alia, that the material was subject to a qualified privilege and that access should be granted to the material only on a showing of particularized need. The Court declined to create a privilege. It examined the public interest in promoting higher education against the public policy of eradicating discrimination in employment. The Court thought that the adoption of a qualified academic freedom privilege would interfere significantly with the enforcement of New Jersey's anti-discrimination law. However, the Court recognized that a plaintiff in a discrimination case ought not to be able to rummage through University files merely by filing a complaint. Accordingly, the Court said that in order for confidential material to be made available to a plaintiff, a court must satisfy itself that the claim of discrimination is valid and that the material sought is relevant to the plaintiff's effort to establish a prima facie case. Further, a court should take measures to minimize intrusion into the confidentiality of the material sought by the entry of protective orders.

With respect to the collective bargaining context, one might expect the Dixon case to be relied upon by a union pursuing a discrimination grievance on behalf of a bargaining unit member. Further, representatives of New Jersey's Public Employment Relations Commission have stated publicly that the Dixon case is applicable to claims of discrimination on account of union activity. The Court in Dixon, however, made no mention of how it might assess a balancing, in the labor relations context, of the public interest in promoting higher education (and the role of confidentiality in that effort) against the interest of eradicating discrimination on account of union activity.

3. Peer Review of Scholarly Articles

The confidentiality of peer review has arisen in the context of evaluation of an article for publication in a scholarly journal. The issue arose in a patent infringement lawsuit. The defendant sought to compel the American Physical Society (APS), not a party in the patent litigation, to disclose the identity of a scholar who had reviewed a manuscript for publication in a journal published by APS. The defendant was attempting to invalidate plaintiff's patent and argued that to do so it needed to know the identity of the reviewing scholar in order to ascertain whether the content of the manuscript had been disseminated prior to publication. APS resisted disclosure of the identity of its reviewer on the ground that confidentiality of its reviewer's identity was essential to the preservation of an effective peer review process which was necessary to maintain the quality of scientific literature. The Court balanced the hardship disclosure would visit upon APS against defendant's hardship if disclosure were denied. Disclosure of the reviewer's identity was not required. The Court determined that defendant's need for the reviewer's identity was minimal while APS' need for confidentiality was substantial. Further, the Court stated that ordering disclosure even with a protective order would pose risks to the confidentiality of the peer review process. Solarex v. Arco Solar, Inc., 121 F.R.D. 163 (E.D.N.Y. 1988), affirmed __ F.2d __ (Fed. Cir. 3/15/89).

4. Peer Review and Anti-Trust Liability

Peer review was addressed in the context of an anti-trust lawsuit in Patrick v. Burget, 108 S.Ct. 1658, rehearing denied, 108 S.Ct. 2921 (1988). Though confidentiality was not an issue in the case, the case reveals, at least in the anti-trust context, the Court's deference (or lack thereof) to peer review proceedings. The case may be relevant, of course, to universities that have medical schools. In Patrick, a physician filed an anti-trust lawsuit against doctors on a hospital peer review committee who had terminated his privileges at the hospital. The defendants argued that they were immune from anti-trust liability because their peer review activities were conducted pursuant to the state of Oregon's policy of fostering quality medical care through peer review. The Court determined that Oregon's failure to supervise actively hospital peer review proceedings did not entitle the defendants to anti-trust immunity.

IV. TENURE LITIGATION

Employees of institutions of higher education who fail to achieve tenure through an institution's regular promotion and tenure process occasionally resort to the courts to vindicate their claims to tenure. The cases below illustrate recent efforts to achieve tenure through litigation.

A. Due Process Claims

Public employees with expectations of continued employment or tenure may rely upon federal civil rights statutes in arguing that they were deprived of a property right (continued employment or tenure) without due process of law.

1. Continued Employment as a Faculty Member

In *Varma v. Bloustein*, the faculty union at Rutgers, The State University of New Jersey, argued that faculty members at Rutgers had a legitimate expectation of tenure upon the performance of their duties in accordance with the University's tenure standards and procedures. A U.S. District Court Judge dismissed the case on the grounds that faculty members did not have a property right in tenure because the tenure standards and procedures did not sufficiently restrict the University's exercise of discretion in the awarding of tenure. Civil No. 84-2332(AET), January 11, 1988, affirmed, 860 F.2d 1077 (3d Cir. 1988), *cert. den.*, 109 S.Ct. 1126 (1989). See, also, *Cohen v. University of Medicine and Dentistry of New Jersey*, 867 F.2d 1455 (3d Cir. 1989) (neither correspondence from chairman of Department of Medicine nor breach of notice of non-renewal provision in University's bylaws create property interest in tenure where only Board of Trustees can grant tenure).

2. Continued Employment as Department Chairperson

Roberts v. College of the Desert, 861 F.2d 1163 (9th Cir. 1988), amended __ F.2d __ (9th Cir. 1989) (department chairperson had property interest in continued employment as chair where community college president acknowledged chair's "just cause" protection against reassignment and right to a hearing).

3. Continued Employment as Administrator

Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1988) (University vice-president may have property interest in continued employment based upon employment contract or personnel policy manual that restricts employer's ability to terminate employment relationship).

B. Contract Claims

Absent a protected property interest, a claim (against a public or private entity) for continued employment may be based upon a breach of contract theory. For example, see *Howard University v. Best*, 547 A.2d 144 (D.C.App. 1988) (claim of tenure based upon faculty handbook failed because of insufficient evidence of University's custom and practice with respect to meaning of provision in faculty handbook); *Gottlieb v. Tulane University*, 529 So.2d 128 (La.App. 4th Cir. 1988), writ denied, 523 So.2d 766 (La. 1988) (promise of automatic tenure in four years made by Chancellor of Medical Center insufficient to sustain breach of contract action where faculty handbook provided that tenure decisions were primarily faculty responsibility with subsequent review by academic officers).

V. MISCELLANEOUS

A. Disparate Impact Theory in Higher Education

1. *Watson v. Fort Worth Bank and Trust*

In *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 47 FEP 102 (1988), the Supreme Court addressed the issue of whether subjective employment practices (in *Watson*, the making of promotion decisions based solely upon the subjective judgment of supervisors) may be reviewed under a "disparate impact" theory under Title VII of the Civil Rights Act of 1964. The Court held, 8-0, that the "disparate impact" analysis may be applied to subjective as well as objective practices.[3]

By way of background, there are two theories that a plaintiff can use in an employment discrimination case. The first theory, designated "disparate treatment," involves an allegation that an employer has treated an individual less favorably than others because of race, sex, or other protected status. In such a case, the individual is required to prove that the employer had a discriminatory intent or motive. The second theory, a designated "disparate impact," does not require proof of discriminatory intent or motive. The "disparate impact" analysis, first enunciated by the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971), involves facially neutral employment practices that have adverse effects on protected groups. For example, where a particular educational degree or passing of a standardized test is required in order to be promoted and this requirement serves disproportionately to eliminate members of minority groups from being promoted, discrimination may be found even though no intent to discriminate has been shown. Once "disparate impact" is established (typically with statistical evidence), the employer is required to show that the facially neutral requirement (i.e. possessing a particular educational degree or passing a standardized test) is justified in terms of business necessity or is sufficiently job related to justify its use. Prior to Watson, the Supreme Court had not addressed whether the "disparate impact" theory is appropriate where a subjective, rather than objective, employment practice is involved.

Watson is relevant to colleges and universities because personnel actions involve, in many cases, subjective and discretionary decisions. The Supreme Court in Watson noted that the means of establishing the business necessity for using subjective criteria will vary from case to case. Both the plurality and concurring opinion cited Zahorik v. Cornell University, 729 F.2d 85, 96, 34 FEP 165, 172 (2d Cir. 1984) to point out how the use of subjective criteria in a university setting might be shown to be job related. The paragraph in Zahorik refered to by the Supreme Court in Watson reads in its entirety as follows:

> ...Cornell's selection criteria, however difficult to apply and however much disagreement they generate in particular cases, are job related. Accomplishments and skills in scholarship and teaching are obviously relevant to employment in tenured professorships. A decentralized decision-making structure founded largely on peer judgment is based on generations of almost universal tradition stemming from considerations as to the stake of an academic department in such decisions and its superior knowledge of the academic field and the work of the individual candidate. It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process plainly relevant criteria largely because they lead to decisions which are difficult for a court to review.

Accordingly, Watson is important because it permits plaintiffs in discrimination cases to employ a "disparate impact" theory in cases involving subjective decision-making. Watson is important to college and universities that employ promotion procedures that rely on subjective academic judgments because the Supreme Court recognized that this type of decision-making is job-related. Thus, in order to prevail under a "disparate impact" theory challenging subjective academic judgments that, statistically, discriminate against a protected group, it probably would be necessary for a plaintiff to show that there were a different way to make promotion and tenure decisions that served the institution's interests as well as subjective peer review judgments.

2. Penk v. Oregon State Board of Higher Education

In Penk v. Oregon State Board of Higher Education, plaintiffs claimed that a variety of facially neutral policies had a "disparate impact" on female faculty members. The Court stated that the policies were job-related. For example, a policy of limiting the proportion of faculty on tenure in certain departments, even though impacting on women, allowed the institutions greater flexibility in staffing and served a financial interest. Requiring that sabbatical leaves be taken away from the institution, even if adversely impacting on women, helped to insure that the sabbatical period is used as a productive educational leave rather than as a vacation. Refusing to hire a faculty member at the institution from which the terminal degree was granted, even if adversely impacting on women, served an institutional interest in avoiding "intellectual inbreeding". 48 FEP 1717, 1719-1721 (D.Ore. 1984), aff'd, 816 F.2d 458, 48 FEP 1878 (9th Cir. 1987), cert. den., 108 S.Ct. 158, pet. for rehearing den., 108 S.Ct. 473 (1987).

B. Adjunct Faculty

In Somerset County College v. Somerset County College Faculty Federation, 13 NJPER 361 (par. 18150 PERC, 1987), aff'd Appellate Division, Docket No. A-4803-86T1 (February 4, 1988), aff'd ___ N.J. ___ (January 24, 1989), the New Jersey Supreme Court, in a one sentence opinion, affirmed a decision that adjunct faculty members were "public employees" entitled to coverage under New Jersey's Employer-Employee Relations Act and, further, that the unit of adjunct faculty "who commenced employment for at least their second semester during a given academic year and who express a willingness to be rehired to teach at least one semester during the next succeeding academic year" was appropriate for collective negotiations. The New Jersey Public Employment Relations Commission noted that its decision was consistent with private sector precedent. See, New School for Social Research, 268 NLRB No. 154, 115 LRRM 1134 (1984; University of San Francisco, 265 NLRB 155, 112 LRRM 1113 (1982).

C. Replacement of Strikers

In TWA v. Flight Attendants, ___ U.S. ___, 130 LRRM 2657 (1989), the Supreme Court held that an employer is not required under the Railway Labor Act to lay off employees who worked during a strike in order to reinstate more senior strikers. The Court noted that the same result would occur under the National Labor Relations Act. Thus, TWA would seem to apply to striking employees in private institutions of higher education. The impact on faculty strikes would not seem to be significant. First, because of their managerial status, faculty mmembers at many institutions do not enjoy collective bargaining rights under the NLRA. Second, even where a faculty union does exist, presumably it is more difficult to replace a faculty member in an institution of higher education than a flight attendant.

With respect to public institutions, TWA does not apply. State law determines whether faculty members may bargain collectively and, if so, whether they have the right to strike. An additional issue that would be relevant in the public sector is the status of the property right of tenure after a strike, particularly an illegal strike.

D. Right to Organize

In Rosen v. Public Employment Relations Board, 530 N.Y.S.2d 534, 526 N.E.2d 25 (Ct.App. 1988), New York's highest court construed the Public Employee's Fair Employment Act (Taylor Law) more narrowly than the National Labor Relations Act and held that a community college faculty member's informal airing of grievances before an associate dean was not protected activity. Thus, in New York, only "the formal organization of employees, or efforts to form an actual organization" are protected under the Taylor Law.

E. Mandatory Retirement

The New Jersey Law Against Discrimination prohibits discrimination on account of age. There is an exception to this prohibition that provides that a tenured faculty who has attained the age of 70 at any institution of higher education "may, at the option of the institution, be required to retire." N.J.S.A. 10:5-2.2. The faculty unions at the University of Medicine and Dentistry of New Jersey and at New Jersey state colleges filed unfair practice charges claiming that the institutions were required to negotiate mandatory retirement policies prior to their adoption. The institutions claimed that the issue of mandatory retirement was not negotiable. The Appellate Division of Superior Court held that 1) negotiation over mandatory retirement is not preempted by statute, 2) the substantive decision to retire a tenured employee upon reaching age 70 is an inherent management prerogative concerning important educational policy and, therefore, is not negotiable, and 3) procedural aspects of mandatory retirement are negotiable. University of Medicine and Dentistry of New Jersey, 223 N.J. Super. 323, 538 A.2d 840 (App.Div. 1988), affirmed, N.J. Supreme Court 4/19/89.

FOOTNOTES

The views expressed in this material are those of the author only and not necessarily those of Rutgers, The State University of New Jersey.

1. See, also Newark Board of Education v. Newark Teachers Union, 377 A.2d 765, 152 N.J. Super. 51 (App. Div. 1977) (Public Employment Relations Comission had power in unfair practice charge proceedings to subpoena minutes and notes of board of education and board's attorney/negotiator made during collective negotiations).

2. By way of background, see the following cases: EEOC v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. den., 106 S.Ct. 2288 (1986) (qualified academic freedom privilege and balancing approach rejected; EEOC's investigative authority requires disclosure of peer review evaluations); EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983) (qualified academic freedom privilege recognized protecting academic institutions against disclosure of names and identities of peer review participants); Gray v. Board of Higher Education of the City of New York, 692 F.2d 901 (2d Cir. 1982) (recognizes First Amendment basis of academic freedom and adopts AAUP's test of balancing need for confidentiality of peer review votes and deliberations against need of civil rights plaintiff for disclosure; plaintiff's need for disclosure prevailed); In re Dinnan, 661 F.2d 426 (5th Cir. 1981), cert. den., sub nom. Dinnan v. Blauberg, 457 U.S. 1106 (1982) (academic freedom privilege rejected where member of Promotion Review Committee refused to disclose vote on plaintiff's application); See, also, Dixon v. Rutgers, 110 N.J. 432, 541 A.2d

1046 (1988), discussed below.

3. The opinion of the Court was a plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Scalia. In a concurring opinion, Justices Blackmun, Brennan and Marshall disagreed with O'Connor's analysis on the issue of burden of proof in a "disparate impact" case. Justice Stevens expressed no opinion on the burden of proof issue. Justice Kennedy took no part in consideration or decision of the case. Accordingly, only four members of the Court agreed with the plurality's decision on the burden of proof issue in a "disparate impact" case.

COLLECTIVE BARGAINING AND THE LAW

B. THE DUTY OF FAIR REPRESENTATION

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THE NATURE OF "THE DUTY"

The duty of fair representation is not set forth in any statute. It is a federal common law doctrine which has public sector analogs under state collective bargaining laws. The duty (which we shall refer to as "the DFR") is a judicial creation which is intended to assure a measure of fair treatment to all employees in a bargaining unit for whom the union is the exclusive representative. The union as exclusive bargaining agent has statutory authority to deal with the employer on behalf of all employees in the unit. As such, it makes decisions which determine the employee's pay, benefits, and job rights. There is no requirement under the federal Taft-Hartley Act that the union seek employee approval in these matters. While unions normally require membership ratification of union contracts, the application of those contracts and day-to-day decisions which affect employees' jobs and livelihoods are made by elected officials who are responsive to the wishes of the majority of the union's members.

DFR was first articulated by the Supreme Court in a 1944 decision under the Railway Labor Act.[1] Recognizing the possibility that a union might use its statutory authority in a way which would discriminate against an employee or group of employees or unfairly restrict or deny their rights, the Court, in order to avoid a potential constitutional issue, held that the law implies a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them." Nine years later the Court extended the DFR to unions regulated by the National Labor Relations Act: "(The unions') statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interest of all...without hostility to any."[2] In 1962, the National Labor Relations Board (NLRB) ruled that a violation of the DFR is an unfair labor practice under the Taft-Hartley Act, stating that the statute guarantees the right to be free from "unfair or irrelevant or invidious treatment" by their union representative.[3] Thus, employees could resort to a court or the NLRB to seek redress from alleged violations of the DFR.

The DFR obligation has been variously described by the courts and the

Board. In the landmark 1967 *Vaca v. Sipes* decision,[4] the Supreme Court held that union conduct which is "arbitrary, discriminatory or in bad faith" would violate the duty, but is also indicated that the union had "a wide range of reasonableness" in making decisions. Most courts have held that conduct which is merely negligent, unaccompanied by bad faith or hostility will not violate the DFR,[5] but this view is not unanimous.[6] However, "perfunctory conduct" which is "no more than going through the motion involving no real effort to put forward a position" may violate the DFR.[7] However, a federal appeals court held that the DFR "was never intended to be a 'catch all' for undesirable union activity" and that it applies only to situations where a member or group of members are treated differently from others, as opposed to improper conduct which affects the entire bargaining unit.[8]

Generalized formulations are of limited help in understanding DFR law. A look at the cases in some areas will illustrate the state of DFR decisional law.

THE DUTY TO ARBITRATE GRIEVANCES

The most common DFR issue which arises is whether a union is required to arbitrate a particular grievance. The *Vaca* decision makes clear that a union is not obligated to arbitrate on the demand of the aggrieved employees. The union may not decline to arbitrate a grievance in a perfunctory manner, without reason or consideration. The union need not arbitrate a case where chances of winning are slight.[9] However, courts will not normally second guess the union's judgment that a grievance will probably not be successful in arbitration,[10] but if the union's refusal to arbitrate is based on alleged disloyalty to the union or personal animosity, there may well be a DFR violation.[11]

If a grievance has not been adequately investigated, so that a critical fact or witness is overlooked, there may be a DFR violation.[12] The careful union representative will obtain all the relevant facts, interview important witnesses, consider the relevant contract language and practices, so that if the determination is not to arbitrate, a reasoned basis for the decision can be articulated.

In some cases, it can be anticipated from the circumstances that the employee whose case does not merit the expense of arbitration may well retain an attorney and resort to the Board or the courts. While some union officers will be inclined to arbitrate such a case, the principled course of action is to marshal all the facts and arguments, perhaps, obtaining the opinion of the union's attorney, and be prepared to offer a carefully reasoned basis for not proceeding to arbitration. Many unions find it helpful to communicate a tentative decision to the employee and offer the opportunity to make an oral or written appeal in which the employee is asked to explain, in detail, why the case should be arbitrated.

The fact that the union has initially supported a grievance does not bind the union to arbitrating the case or to making a compromise settlement with the employer. In considering whether to accept a settlement providing less than what the employee wants, the union may properly consider the costs of further processing of the grievance.[13]

FAILURE TO PROCESS A GRIEVANCE IN TIMELY FASHION

Most labor agreements contain time limitations for filing and processing grievances and submitting cases to arbitration, and failure to meet such limitations is frequently held to preclude arbitration. It seems clear that if the union simply ignores a grievance and allows the time limits to lapse, a violation of the DFR will be found.[14] But, if there is no evidence of bad faith or hostility toward the employee, and the union has attended to the case, an oversight which results in an untimely effort to arbitrate will be considered the kind of "mere negligence" which may not result in a finding of violation of the duty.

If, however, the grievance is so lacking in merit that it would not be sustained in arbitration, the union's failure to submit it in a timely fashion or even a refusal to submit it for an improper reason will preclude relief to the employee.[15]

THE DUTY OF FAIR REPRESENTATION IN CONTRACT NEGOTIATIONS

Many DFR questions arise during contract negotiations when the bargaining agent must balance the competing demands of its various constituent groups. The Supreme Court has articulated the following standard:

> The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents...Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, always subject to complete good faith and honesty of purpose in the exercise of its discretion.[16]

Virtually all contract negotiations involve decisions as to where to seek to have the available funds expended. The question whether a union may seek or acquiesce in a two tier wage structure whereby future hires, who will not vote at contract ratification, will do the same work as the current workforce at lower wages has recently been raised in the literature.[17] There are no decided cases which would support a finding of DFR violation in this situation, but the possibility cannot be ignored.

If a particular bargaining demand which would benefit one constituent group at the expense of another is plainly made to appease the larger group, a DFR violation may be found. For example, if a union refuses to consider "dovetailing" seniority lists in order to please the larger group of employees where two separate plants have been consolidated, a violation may be found,[18] although simply applying an existing plant seniority rule when one of a number of plants close would seem to be lawful.

Difficult questions arise when the union leadership misrepresents the terms of a settlement when seeking to secure ratification of an agreement or in urging strike action. For example, a DFR violation was found when the union deliberately failed to inform clerical employees in a bargaining unit of the employer's threat to abolish their jobs if the union persisted in its wage demands.[19] However, no DFR violation was found where a union representative mistakenly assured employees that a then-existing special fund guaranteed payment of severance, and when the company became insolvent it was learned that there was no such fund.[20]

Unions must exercise care when urging employees to take strike action or to engage in activity which may not be protected under the collective bargaining statutes. One court held that a union need not explain to its members the possibility that they could be replaced if they decided to go on an economic strike and that an alleged misrepresentation of that possibility would not be a DFR violation because general knowledge of the law in the area is presumed.[21] It cannot be assumed that other courts would agree that such a misrepresentation would not result in liability. A more difficult case would be presented if the union failed to advise employees at the time of a strike vote that the strike would be unlawful because of the existence of a no-strike agreement or because of some improper objective of the strike.

THE DUTY OF FAIR REPRESENTATION WHERE MEMBERS' INTERESTS ARE ADVERSE

Difficult problems arise when the interests of two or more members come into direct conflict. For example, if two members engage in an altercation, each accusing the other of being an aggressor, the case must be investigated and handled with care to serve the interests of each, while avoiding liability if the determination is to proceed to arbitrate the discipline of one on the basis that the other was the aggressor. Equally difficult is the situation where two employees compete for a vacant job under contract language which makes ability to do the job as well as seniority relevant factors. Unions traditionally agree that seniority should be the determining factor, at least where the senior employee has the capacity to do or to learn the job. But, where the agreement makes ability a factor, the union may violate the DFR if it disregards and refuses to consider that attribute in determining whether to arbitrate and how to try the arbitration.[22]

When a union has a number of grievances pending with the employer, one or the other party may offer to make a "package settlement," disposing of more than one case at the same time. While this is often a useful technique in settling cases of questionable value, a union should avoid swapping grievances where a grievance having apparent merit is withdrawn, especially if it involves disciplinary action imposed on a member.[23]

PROCEDURES IN DFR CLAIMS

An employee must first attempt to invoke whatever contractual remedies are available under the labor contract.[24] In some circumstances, internal union remedies which would provide effective redress must be invoked.[25] An employee may assert a DFR claim by filing a charge with the NLRB or by filing suit within six months of the action complained of,[26] or within the applicable time limit of the state agency in case of public employment. The union will be a defendant, and if the claim is based on the union's failure to deal adequately with an action taken by the employer in violation of contract or some other legal obligation, the employer may also be a defendant.[27] If the union has refused to arbitrate a grievance because of lack of merit, the NLRB places the burden of proof on the union to show the lack of merit.[28] Damages are awarded the injured employee which are apportioned between the employer and the union according to the damage caused by each.[29] Punitive damages are not recoverable against the union[30] and some, but not all, courts have awarded attorney's fees to a successful plaintiff.[31]

SOME OBSERVATIONS

The doctrine of fair representation has had a profound and, in many respects, positive effect on labor management relations. The union and the employer must be sensitive to individual rights and the interests of minority groups. Unions have responded to court decisions by handling grievances with greater due process. An unfortunate by-product is that, in many instances, unions will arbitrate cases which have no merit or where the probability of sucess is remote because it is thought preferable to refusing to arbitrate and having to face a threat of litigation by a disappointed member.

Unions should not arbitrate unmeritorious cases because of a fear of a DFR claim. My experience is that few DFR claims have merit and fewer still result in liability. Indeed, the experience of our office is that in only one case has it been thought advisable to settle a DFR claim, and that was only because the union officer who determined not to arbitrate was not available to explain why that decision was made.

FOOTNOTES

1. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944) (seniority system which discriminated against blacks).

2. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

3. Miranda Fuel Co., 140 NLRB 181 (1962), reversed, 326 F.2d 172 (2nd Cir. 1963).

4. Vaca v. Sipes, 386 U.S. 171 (1967).

5. See, e.g., Early v. Eastern Transfer, 699 F.2d 552 (1st Cir. 1983); Sanders v. Youthcraft Coats & Suits, Inc., 700 F.2d 1226 (8th Cir. 1983).

6. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983); Eichelberger v. NLRB, 765 F.2d 851 (9th Cir. 1985).

7. Stevens v. Teamsters Local 1600, 794 F.2d 376 (8th Cir. 1986).

8. NLRB v. Local 299, Teamsters, 782 F.2d 46 (6th Cir. 1986).

9. King v. Space Couriers, Inc., 608 F.2d 283 (8th Cir. 1979).

10. Freeman v. O'Neal Steel Co., 609 F.2d 1123 (5th Cir. 1980).

11. NLRB v. Pacific Coast Utility Service, 638 F.2d 73 (9th Cir. 1980); Plumbers' Local Union 598 (Columbia Mechanical Contractors Assoc., 250 NLRB 75 (1980).

12. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); Teamsters Local 307 (Jelco, Inc.), 228 NLRB 1450 (1978).

13. NLRB General Counsel Memorandum No. 79-55, Labor Relations Yearbook - 1979, B.N.A. at 345.

14. Vaca v. Sipes, supra, 386 U.S. at 191; Foust v. IBEW, 572 F.2d 170 (10th Cir. 1978), modified, 442 U.S. 42 (1979).

15. Kissinger v. U.S. Postal Service, 801 F.2d 351 (1st Cir. 1986); Wyatt v. Interstate Ocean and Transport Co., 623 F.2d 888 (4th Cir. 1980).

16. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

17. Note, "Two-Tier Wage Discrimination and the Duty of Fair Representation," 98 Harv. L. Rev. 631 (1985).

18. See, e.g., Red Ball Motor Freight, 157 NLRB 1237 (1966), enforced sub nom. Truck Drivers Local 658 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967); Barton Brands, Ltd., 213 NLRB 640 (1974), reversed in part and remanded, 529 F.2d 793 (7th Cir. 1976); Baker v. Communications Union Local 6, 104 LRRM 2197 (D.C. Cir. 1980).

19. Warehouse Union Local 680 v. NLRB, 652 F.2d 1022 (D.C. Cir. 1981). See also, Farmer v. Hotel & Restaurant Employees Local 1064, 99 LRRM 2166 (D.E. Mich. 1978).

20. Anderson v. Paperworkers, 641 F.2d 574 (8th Cir. 1981).

21. Swatts v. Steelworkers, 585 F. Supp. 326 (S.D. Ind. 1984), aff'd., 808 F.2d 1221 (7th Cir. 1986).

22. Smith v. Hussman Refrigerator, 619 F.2d 1229 (8th Cir. 1980).

23. See, e.g., Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975); Local 13, Longshoremen v. Pacific Maritime Assoc., 441 F.2d 1061 (9th Cir. 1971); but cf. Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 742 (1981).

24. Vaca v. Sipes, 386 U.S. 171 (1967).

25. Clayton v. UAW, 451 U.S. 679 (1981).

26. Del Costello v. Teamsters, U.S. (1983).

27. Czosek v. O'Mara, 397 U.S. 25 (1970).

28. United Rubber, Cork, Linoleum and Plaster Workers, Local 290, NLRB No. 90, 129 LRRM 1129 (1988).

29. Bowen v. U.S. Postal Service, 459 U.S. 212 (1983).

30. IBEW v. Foust, 442 U.S. 42 (1979).

31. Compare, e.g., Rolax v. Atlantic Coast R.R. Co., 186 F.2d 473, 481 (4th Cir. 1951), Harrison v. United Transportation Union, 530 F.2d 558, 564 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976), with Sanabria v. Longshoremen, 101 LRRM 2282 (1st Cir. 1979).

COLLECTIVE BARGAINING AND THE LAW

C. STEPS FOR COMPLYING WITH AGENCY FEE REQUIREMENTS: A PRACTICAL GUIDE FOR UNIONS

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Agency fees are monies that unions collect from individuals in a bargaining unit who decline to join the union. They are sometimes called "service fees," "fair share fees," or "representation fees". The rationale for agency fees is that the nonmembers benefit from the work of the union and, therefore, should share in the cost of supporting its work. This paper is a primer designed to acquaint readers unfamiliar with the collection of agency fees with some basic concepts.

The subject of agency fees is laced with legal requirements, and there are many sources of law on the subject. In public colleges and universities, both constitutional requirements and the provisions of any public employee bargaining statute must be observed. In the private sector, the requirements of the National Labor Relations Act are controlling. Some agency fee issues have been litigated under the bargaining law in the railroad and airline industries, the Railway Labor Act. These transportation cases provide additional guidance. While the sources of law are diverse, some basic common principles may be extracted.

Consultation with your union's attorney is important before collecting agency fees. Some nonmembers do not take kindly to making compulsory payments to the union, and the National Right to Work Organization has been active in litigation challenging agency fee systems. Implementing a sound system from the outset can save some headaches.

A few pointers on nomenclature are in order. We need to distinguish union members from nonmembers, and to define the concept of agency fee "obligation". Within the bargaining unit, there are probably both union members, who pay dues and have voting rights, and nonmembers, who do not. Agency fees are assessed on the nonmembers. As explained below, the nonmembers must be given an opportunity to object to the payment of agency fees. Some may take advantage of this opportunity, and they become objectors. So an objector is someone in the bargaining unit who has not joined the union and who has affirmatively voiced objection to the payment of an agency fee.

The group of nonmembers is thus subdivided into those who lodge objections and those who do not. The objectors are entitled to special treatment in that they can only be forced to pay for "chargeable" items in the union budget. The nonmembers who do not object can generally be required to pay the same amount in agency fees as the union's members pay in dues. Limited exceptions may arise from laws or contract provisions, but the general idea is that only the objectors pay a reduced amount to the union.

Having stated the general rule that nonmembers who do not object can be required to pay the equivalent of full union dues, we digress momentarily on the exceptions to the rule. Some states, New Jersey, Illinois, and Minnesota among them, have limited, by statute, the amount that can be collected from a nonmember, even a nonmember who has not filed an objection. So start from the premise that only objectors pay a reduced fee, but then look into whether any requirements exist that would limit the fees to be collected even from nonmembers who are not objectors.

GETTING STARTED

Perhaps, your union has negotiated a contract provision for the collection of agency fees, or perhaps, you are automatically entitled to collect fees by operation of your public sector bargaining law. What do you do now? There are three basic steps:

1. Calculating the chargeable and nonchargeable portions of the union budget;

2. Establishing procedures for notifying nonmembers about agency fees, for receiving objections, and for resolving appeals; and

3. Putting into place a means to collect fees from nonmembers and to enforce the payment obligation.

The local union treasurer might be a logical candidate to work on these steps, in conjunction with union staff. Some accounting assistance will be necessary, and legal help as well. The union governing board may want to review the calculations, formally adopt the procedures, and review appeals and proposed enforcement actions.

Once sound procedures are in place, the continuing obligations involve annual calculations, distribution of notice about the agency fee system, and receipt and processing of any objections. These steps do require some effort, but most unions find that the financial gains accruing from collecting agency fees outweigh the burden. As a side benefit, the exercise of carefully analyzing the union's expenditures can aid, generally, in financial management.

CALCULATING CHARGEABLE AND NONCHARGEABLE AMOUNTS

The union's expenditures must be divided into two categories: chargeable and nonchargeable amounts. These are the expenditures that objecting nonmembers can and cannot be forced to support. In very general terms, nonmembers are obliged to support the basic work of the union, but need not support collateral activities that it undertakes.

The Supreme Court explained this distinction in Ellis v. Railway Clerks, (466 U.S. 435 (1984)) as follows:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the

> employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

A major cateogry of nonchargeable expenses is those items available to members only. If a nonmember does not receive union publications or group insurance, for example, he or she may not be compelled, over objection, to finance these items. Special attention should be paid to the areas of lobbying and organizing, as these often provoke controversy. Further illustration will help clarify chargeable and nonchargeable expenditures. Please note that requirements vary by state, and that the law is evolving further. Do not take these illustrations as gospel. (See Figure 1.)

CALCULATION REQUIREMENTS

Sound financial records are necessary so that chargeable and nonchargeable expenditures can be reliably identified. The union's financial statements may group expenditures by program, adding together all costs associated with a particular program or project, such as negotiations, contract administration, or sponsoring a conference. Under such a program budget, paid staff time, telephone costs, rent, and other incidentals would be included in the total for each program. The union's financial statements might instead, group expenditures by category, such as salaries, rent, postage, and travel, without reference to particular programs.

Under either system, all expenditures would have to be allocated as chargeable or nonchargeable. In a program budget, all of the negotiation expenses would be chargeable. In a budget based on categories, the costs associated with negotiations would have to be identified within the lines for salaries, telephone, postage, and so forth.

If you do not have one already, some system will have to be developed for tracking the activities of any paid union staff member, so that their salaries can be allocated into chargeable and nonchargeable shares. Time sheets are one common mechanism. These need not be daily; time sheets might be maintained for a typical week or two each month and used as the basis for extrapolation. Other mechanisms might be diaries or regular interviews with staff about their activities.

Some unions track other expenses such as postage, telephone, and photocopying, or make reliable estimates as to chargeable and nonchargeable components of such expenses.

Someone knowledgeable about agency fee matters, such as the union attorney or an accountant with previous experience in agency fees, should be involved in the initial designations of chargeable and nonchargeable expenditures. Expenditures in doubt should be treated as nonchargeable.

The Supreme Court commented on the calculation requirements in the Hudson case. The Court stated that unions in the public sector should not be held to a standard of "absolute precision" and that, for example, the fee can be calculated on the basis of expenses during the preceding year. The Court called

Figure 1

Examples of Chargeable Expenses	**Case Reference** (See Appendix for case citations)
Negotiation	*Ellis*
Grievance handling	*Ellis*
Arbitration	*Ellis*
Union conventions	*Ellis*
Union social activities	*Ellis*
Publications (except for portions reporting on nonchargeable activities)	*Ellis*
Litigation related to the union's functions or organizational maintenance, if it pertains to the particular bargaining unit in which the objector is employed	*Ellis*
Lobbying germane to the bargaining representative's duties, such as fringe benefits or budget allocations to the university	*Champion*, *Lehnert*, *New Prairie*, *Robinson*, but see NLRB General Counsel's Guidelines (11/15/88)
Training workshops, professional development activities, academic freedom work	*Abels*, *Knight*, *Lehnert*
Payments made to state and national affiliates and used at those levels for chargeable activities	*Kilpatrick*, *Abels*
Union Overhead	*DuQuion*
Examples of Nonchargeable Expenses	**Case References**
Political campaign contributions	*Street*
Lobbying on idelogical issues unrelated to union functions, for exammple, abortion or gun control	*University of Detroit*
Benefits available only to members such as insurance or publications	*Ellis*
Organizing new members (as distinct from soliciting and processing renewals of current members)	*Ellis*, *Lehnert*
Grant to another local union	*Lehnert*

for verification of the calculations by an independent auditor. This auditor requirement has been examined in some later cases in the lower courts. Several courts have held that the auditor's job is not to allocate expenses as chargeable and nonchargeable. (Hudson on remand, 699 F.Supp. 1334 (N.D. Ill. 1989)). The auditor's function is rather to assure that the union has a reliable system for tracking expenditures and that the money was spent as indicated. Some unions that are more centralized at the state or national levels forego having auditors examine the financial statements of each local unit instead, extrapolating from the national and state audited statements.

To summarize to this point, the union's expenditures should be reflected in reliable financial records. A mechanism should exist for allocating staff salaries. Expenses should then be designated as chargeable or nonchargeable, and the calculations reviewed by an independent auditor.

OBJECTIONS AND APPEAL PROCEDURES

Now that you've got your calculations in order, the next steps are to notify the "potential objectors," receive and process any objections that might be filed, adjust the payments made by objectors to the "chargeable" amount, and provide an impartial appeal route.

1) **Notice to Nonmembers:** All nonmembers must receive notice about the calculation of the agency fee. In Hudson, the Supreme Court directed public sector unions to give advance notice to potential objectors of the agency fee, with "sufficient information to gauge the propriety of the union's fee". Some unions that distribute their newsletters to nonmembers put the notice in the newsletter, others send out the notice as a separate mailing. If you do a separate mailing, consider whether you want to send it to the union members in addition to the nonmembers.

The NLRB General Counsel issued guidelines in November, 1988 suggesting that these standards developed in the public sector might also apply in the private sector. She indicated that the notice should go out as soon as practicable after the end of the union's fiscal year. The degree of detail required in the notice is a subject to discuss with the union attorney.

2) **Objections:** The nonmembers must have a reasonable time period in which to file an objection, explained in the notice. The objection need not be specific. "I object" is enough, and the objector need not identify any portion of the calculations with which he or she takes issue. Upon receipt of an objection, the union should cease collecting the nonchargeable amount from that individual. Nonmembers who do not lodge objections generally require no special treatment other than the annual notice, unless the contract or bargaining law specifies to the contrary. Agency fee payers can be required to resubmit objections each year. If after the fee is reduced to the chargeable items some expenditures remain in dispute, an escrow can be used as additional protection.

3) **Appeal Procedures:** Objectors must have access to an impartial forum for appeal of the amount of the chargeable and nonchargeable expenditures. The basic obligation to pay some fee is not subject to challenge (assuming that the union's procedures are adequate). Some state PERBs have mechanisms for appealing the amount of the fee, while other systems rely on arbitrators to perform this function. The American Arbitration Association has special rules on agency fee cases and arbitrators specifically designated for this work. The union cannot unilaterally select the arbitrator. It does, however, generally wind up paying for the cost of the arbitration.

In the private sector, an objector can challenge the union's calculations through a charge filed with the NLRB. Any disputed amounts must be held in an interest-bearing escrow accunt while the charge is being processed. If the union has established an adequate neutral arbitration system, the NLRB will, under certain circumstances, hold the charge in abeyance until the arbitration is completed.

Whoever the impartial decisionmaker is, the union bears the burden of proof in the appeal proceeding. The union may have to adduce evidence showing how its financial recordkeeping system works, how it allocated expenditures as chargeable and nonchargeable, what notice the nonmembers received, and how it handled objections.

COLLECTION AND ENFORCEMENT MECHANISMS

Once your expenditure calculations and procedures are in place, the final step is to collect the agency fees. Payroll deduction is the most common method for collecting union dues, and may also be used for payment of fees. Fees can also be collected by direct payment from the nonmembers, a method obviously more prone to result in nonpayment.

Enforcing the obligation to pay fees against any delinquent nonmembers may become necessary, and it can be a ticklish business. Several options are discussed below, and the advice of counsel would be important in selecting these or other avenues:

1) Litigation. Small claims court actions are sometimes filed against delinquent nonmembers and, provided that the union's procedures are adequate, can be successful. (See San Lorenzo, Fort Wayne).

2) Suspension without pay. At least one AAUP chapter negotiated a contract provision that nonmembers who are in arrears and who do not respond to notices of the delinquency can be suspended without pay for a number of days so that the lost salary equals the unpaid fee. These suspensions are generally implemented over the Christmas holiday period, so that teaching duties are not disrupted.

3) Dismissal. Dismissal may be an option under your contract or state law for nonpayment of fees. This severe sanction should be used with extreme caution.

4) Ignoring the problem. If the number of delinquent nonmembers is small, some unions choose simply to ignore the fact of nonpayment.

Note that some individuals may have religious beliefs conflicting with the payment of fees to unions. Unions should proceed with special care (and legal advice) in these situations. (See generally EEOC v. University of Detroit).

You are now equipped with basic information on the three steps for unions to implement an agency fee system: calculating the chargeable and nonchargeable expenditures; establishing procedures for notice, objections, and appeals; and collecting from willing and unwilling payers. With a little help from an accountant and a lawyer, your system should meet the necessary requirements.

APPENDIX

There is a large body of case law in the federal and state courts on the collection and use of agency fees. The Supreme Court decisions are of central importance, and many lower courts have provided elaboration of the basic rules

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enunciated by the United States Supreme Court. This case list is illustrative, not exhaustive, and some of the citations may require updating. The list will provide an introduction to lawyers unfamiliar with the area. Unfortunately, there seems to be little commentary accessible to nonlawyers on agency fee requirements. Perhaps, once the law settles down a bit from the current activity, more will be written.

1) The major United States Supreme Court agency fee decisions:

Railway Employes' Dept. AFL v. Hanson, 351 U.S. 225 (1956) (construing both Railway Labor Act and Constitution).

International Association of Machinists v. Street, 367 U.S. 740 (1961) (Railway Labor Act).

Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (163) (Railway Labor Act).

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (Constitution).

Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984) (Railway Labor Act).

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) (Constitution).

Communications Workers of America v. Beck, 108 S.Ct. 2641 (1988) (National Labor Relations Act).

2) Some of the many lower court agency fee decisions — these include discussion of chargeable and nonchargeable expenditures.

Champion v. California, 738 F.2d 1082 (9th Cir. 1984).

Lehnert v. Ferris Faculty Association, 643 F.Supp. 1306 (W.D. Mich. 1986), 685 F.Supp. 164 (W.D. Mich. 1987), appeals pending.

New Prairie Classroom Teachers Association v. Stewart, 487 N.E.2d 1324 (Ind. App. 1986).

Kilpatrick v. Board of Education, 535 A.2d 1311 (Conn.S.Ct. 1988).

EEOC v. University of Detroit, 701 F.Supp. 1326, 48 FEP Cases 1021 (E.D. Mich. 1988).

Abels v. Monroe County Education Association, 489 N.E.2d 533 (Ind. App. 1986).

Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), 806 F.2d 442 (3d Cir. 1986).

DuQuion Education Association v. Bosecker, Illinois Education Labor Relations Board, 1988, discussed in Government Employee Relations Report, 5-9-88.

Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987).

3) Some lower court decisions with some discussion on the adequacy of union agency fee procedures:

Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).

Hudson v. Chicago Teachers Union, on remand, 699 F.Supp. 1334 (N.D. Ill. 1989).

Andrews v. Education Association of Cheshire, 829 F.2d 335 (2d Cir. 1987), *aff'g* 126 LRRM 2844 (D.Conn. 1987).

Lowary v. Lexington Local Board of Education, 854 F.2d 131 (6th Cir. 1988).

San Lorenzo Education Association v. Wilson, 654 P.2d 202 (Cal. Sup. Ct. 1982).

Fort Wayne Education Association v. Goetz, 443 N.E.2d 364 (Ind. App. 1982).

Anderson Federation of Teachers v. Alexander, 416 N.E.2d 1327 (Ind. App. 1981).

Hohe v. Casey, 129 LRRM 249 (M.D. Pa. 1988), aff'd. No. 88-5735 (3d Cir. 1989).

Jordi v. Sauk Prairie School Board, 651 F.Supp. 1566 (W.D. Wisc. 1987).

COLLECTIVE BARGAINING AND THE LAW

D. UNION SECURITY IN NEW YORK STATE'S PUBLIC SECTOR

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PERB JURISDICTION

Pursuant to § 208.3(a) and (b) of the New York State Public Employee's Fair Employment Act (Act), an employee organization may be entitled, as an incident of recognition or certification, to have an amount equal to union dues deducted from the wages of all non-union member employees in the form of an agency shop fee. Such agency fee money is to be applied to the costs of collective bargaining and contract administration. Under subsection (a), state government employees' agency fees are deducted automatically, whereas, under subsection (b), local government employees are entitled to bargain collectively over the inclusion or exclusion of such a deduction procedure in their collective bargaining agreements. However, pursuant to statute, an employee organization will only be entitled to deduct such agency fees where it has "established and maintained a procedure providing for the refund to any employee demanding the return of any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment." This restriction was incorporated into the Act for the purposes of compliance with the Supreme Court's decision in *Abood v. Detroit Board of Education.*[1] In *Abood*, the Court determined that *no constitutional prohibition existed regarding* an agency shop fee agreement between a public employee organization and its non-participating employees, where such employees would be required to pay for the benefits they receive through the collective bargaining process. The *Abood* Court did, however, determine that any employees who chose not to *participate* as union members could not, consistent with the First Amendment, be required to finance, through their agency fee, any political or ideological cause to which they did not subscribe. In order to remedy any possible misapplication of monies and to pass constitutional muster, the Court found that an employee organization would be entitled to an agency fee deduction only where a refund procedure exists for the benefit of dissenting employees.

Subsequent to its decision in *Abood*, the Court has decided other cases which have served to more *thoroughly* define the proper scope of a constitutionally appropriate refund procedure. The two decisions which are most instructive in this area are *Ellis v. Railway Clerks,*[2] and *Chicago Teachers Union*

v. Hudson.[3] In Ellis, the Court determined that refunding the objectionable portion of a dissenting employee's agency shop fee through a pure year-end rebate approach was inappropriate. In finding that such a procedure would amount to an "involuntary loan" to the union, the Court determined that dissenting employees' rights would be violated if the union were allowed to use their funds even on a temporary basis. In Hudson, the Court evaluated the constitutionality of a union's refund procedure and promulgated three constitutional requirements for a union's authorized collection of agency fees. The three requirements are "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

Since the enactment of § 208.3 of the Civil Service Law, the New York State Public Employment Relations Board (PERB) has had the opportunity to evaluate, in conjunction with the aforementioned Supreme Court decisions, the adequacy of the rebate procedures proposed and enacted by public employee organizations. Some of the original requirements announced by PERB have been modified, or partially overruled by the Court's holdings in Hudson and Ellis, while some of the more recent requirements have been shaped to conform to those mandates. Most instructive in this area is UUP v. Barry.[4] The decision represents the most comprehensive definition to date of the proper application of § 208.3 to the most recent and most relevant case law, and analyzes an advance reduction procedure. Where an employee organization has decided to create an advance-reduction method of payment to its objecting employees, the decision sets forth a list of criteria to which the employee organization must adhere. When viewed contemporaneously with both prior and subsequent Board decisions, one can gain a useful perspective on the financial disclosure, notice and other procedural requirements which are to be incorporated in a proper agency fee rebate procedure.

REQUIREMENTS OF AN AGENCY FEE REFUND PROCEDURE

The following criteria were announced in Barry:[5]

1) The employee organization must allow its agency fee payers to object to the use of fees for purposes excluded by the Act before the start of the fiscal year.

2) The employee organization must supply to agency fee payers the financial information which formed the basis for the organization's determination prior to the filing period for objections.

3) The employee organization must base its determination of the advance reduction on an independent audit of those expenditures which are refundable and those that are not refundable.

4) The employee organization must provide for a reasonably prompt appellate procedure to be heard by a third party who is not chosen by the union.

5) The employee organization must provide for an interest-bearing escrow account to hold the amount of fees which are reasonably in dispute, or create a payment cushion to reasonably overcome the possibility of use of objectors' fees for impermissible purposes.

6) The employee organization must provide audit and appellate procedures at year's end in order to assure that none of the objecting employees' fees were used for an impermissible purpose.

With respect to the first criterion, the Board has determined the proper time frame and means of notice to agency fee payers regarding the availability of ~~the rebate~~ procedure. In UUP v. Eson,[6] the Board determined that notice would be adequate where the organization announced its policy ten days prior to the period in which dissenters are able to file their objections. With regard to the length of time that should be accorded for the filing of objections, the Board has overruled that portion of its decision in Eson which has authorized a 15-day filing period as sufficient; in Barry,[7] the Board required a 30-day filing period. With regard to the method of communicating the availability of the rebate procedure, the Board in Eson v. UUP,[8] reaffirmed its long-standing policy that publication in the union newspaper of such procedure constitutes an adequate means of notice, so long as the notice is marked with a "conspicuous informative heading" in order to draw the notice to the attention of those "unlikely to read normal union communications."[9] The Board has also decided, in Barry v. UUP,[10] that an employee organization need not include, in its written procedure, the means by which it intends to communicate the availability of such procedures to its objecting members. As long as the employee organization, in fact, notifies its dissenting employees that the rebate procedure is available to them either by mail or through the union newspaper, and the employee organization does so notify its dissenting employees at least ten days prior to the period for filing objections, the notice requirements promulgated by the Board will be satisfied.

With regard to the second criterion, the Board has, once again, determined the proper means and the adequate scope of notice to be provided to the agency fee payer. The Board decided that where the employee organization uses the advance reduction method to fulfill its statutory obligation, it must provide the affected employees with both the determination of the amount or percentage of the refund and the financial information upon which that determination was based. In addition, the Board has found that the supporting financial information and the notice of the organization's determination of the refund must be sent together through the mail to all agency fee payers. Dissenting emmployees wishing to file objections to the organization's determination, need not, as had been previously held in Eson send their objections by certified or registered mail.[12]

With regard to the third criterion, the Board has consistently held that the proper scope of financial information includes an "itemized audited statement of its receipts and disbursements and those of any of its affiliates receiving its revenues from agency fees", and that "this statement should indicate the basis of the Association's determination of the amount of the refund, including identification of those disbursements of the Association and its affiliates that are refundable and those that are not."[13] The Board has long emphasized that the provision of such financial information to its dissenting employees will enable them to make an informed decision regarding both the amount of the refund and the feasibility of appeal. In Hampton Bays, the Board had contemplated an "internal accounting system" to conduct and provide the itemized statement. However, the Board, based upon language in Hudson now requires a financial statement based upon an independent audit.[14] The independent audit is not intended to determine what expenses are properly chargeable and which are not, but is intended to establish the accuracy of the expenditures and their computation. It is for the arbitrator to decide whether the employee organization correctly categorized its expenditures and the percentage of expenditures which are to be charged to fee payers.[15]

With respect to the fourth criterion, the Board has approved the use of the American Arbitration Association in selecting a neutral to decide any disputes regarding the amount of the agency fee. Such approval is consistent with the Board's long-standing position concerning its lack of authority to decide questions of the adequacy of the refund. In Hampton Bays, the Board found that its jurisdiction extends only to the "structural provisions of the refund mechanism", and, as such, an employee who challenges the amount returned, rather than the proper availability of the rebate procedure itself, may not seek a remedy through the auspices of the Board.[16] The employee can, however, bring the matter before an independent arbiter, and as declared by the Board in UUP,[17] the forum selected for the arbitration must be "reasonably accessible to the affected class of employees."

With regard to the fifth criterion, the Board has authorized an alternative to the requirement of holding reasonably disputed funds in escrow to deal with the problem of unanticipated expenditures which may be applied toward an impermissible purpose. The Board now permits the employee organization to include a "cushion" of "not less than 10% of the audited amount for the base year" in the ordinary reduction payment.[18]

With regard to the sixth criterion, the Board has suggested the possibility that the retention of 100% of the agency fee in escrow may be the best route. By requiring that the organization provide, under an advance reduction method, both a year-end audit and appellate procedure, and a "front-end" audit and appellate procedure to review projected fiscal year expenditures, the Board is reaffirming the principle that under no circumstances should an agency fee payer's funds be used, even temporarily, for an impermissible purpose and that an adjustment in the amount of the reduction based upon actual fiscal year expenditures must be made and must meet objective independent criteria.

USE OF AGENCY FEES AND THE DUTY OF FAIR REPRESENTATION

Another issue which has evolved as a result of the enactment of § 208.3(a) and (b) involves the necessity of extending particular union benefits to nonmembers where such benefits are, in part, financed by the nonparticipating employees' agency shop fees. The Board's findings in this area have developed within the context of an employee organization's common law duty of fair representation (DFR) and its obligation to comply with statutory prohibitions respecting interference and/or coercion of employees in the exercise of their Taylor Law rights. The duty of fair representation has been interpreted by the Board to require that employee organizations refrain from discriminating between members and nonmembers, and has been developed to ensure that an organization represents all of the employees, both participating and nonparticipating, "equally with respect to all job-related benefits."[19] The Board has also analyzed, within the context of its improper practice jurisdiction, the various statutory provisions which serve to prevent an employee organization from engaging in such discriminatory practices. Pursuant to § 202, public employees are granted the right to participate in or to refrain from participating in any employee organization. Under § 209-a.2(a), an employee organization may be found to have committed an improper practice where it "interferes with, restrains or coerces public employees in the exercise of their rights granted pursuant to § 202." Under § 208.3(a), the employee organization is admonished that although it may deduct agency shop fees from nonmembers, it may not, as a result, "require an employee to become a member of such employee organization." Taken together, these sections have been found to prevent an employee organization from denying certain benefits to nonmembers where such denial may affect the employee's decision relative to membership or nonmembership in the union, and may tend to discriminate between those employees who choose the latter option. The practical result of the interplay between both the common law DFR claim and the statutory improper practice charge, has been to place a further restriction, relative to the constitutional barrier, upon an employee organization's use of the agency shop fees collected from nonmembers, in addition to the prohibition against application of such fees to statutorily prohibited political or ideological expenditures. In the absence of these additional restrictions, an employee who objected to the use of his agency fee for benefits to which the employee organization found that he was not entitled, would be denied the opportunity to redress his claim under § 208.3(a) in that the rebate procedure has been held to be the exclusive remedy for an alleged misapplication of nonmember fees. UFT v. Barnett,[20] UUP v. Barry.[21]

The Board has had occasion to evaluate the types of benefits which, if withheld from an employee as an incident of nonmembership in an employee organization, would either have the tendency to discriminate or which would necessarily impact upon the employee's membership decision. A threshold inquiry with respect to this matter concerns whether or not an employee organization is required to provide benefits to nonmember employees where such benefits are not financed, in whole, or in part, by agency shop fees. In UUP,[22] this issue was presented in the context of an allegation of misrepresentation with respect to a union brochure which stated that nonmembers would be ineligible for benefits listed therein. The union was, despite its statements in the brochure, in fact furnishing the listed benefits to nonmembers. The Board found that "although the union need not provide nonmembers with benefits not funded by agency fees..., having chosen to make those benefits available to nonmembers, the union may not lawfully misrepresent to nonmembers that benefits are not available to them."[23]

Another line of cases illustrates the Board's position with respect to the provision or denial of benefits which are, in whole or in part, funded by agency shop fees. In UUP v. Newman,[24] the union had used a portion of its agency fees to purchase group insurance. However, only union members were allowed to participate in the program. The Board found such action to be discriminatory, and otherwise coercive of employee rights, in that the denial of this benefit may act to induce employees to join the union in order to qualify for coverage under the insurance plan. In so finding, the Board emphasized that the Act clearly reflects the legislature's intention "to preserve an employee's right not to participate in an employee organization".[25] In UFT v. Barnett,[26] the Board examined nonmembers' rights, relative to those of members, where the union provided subscriptions to work-related publications, financed, in part, by agency fees, to the latter, but not to the former. As distinguished from the provision of insurance benefits, the Board determined that the subscriptions there in issue did not constitute a "substantial economic benefit", and were not sufficiently "job related" as to warrant a finding of a DFR/Taylor Law violation. The Board also emphasized the difference between direct and indirect benefits relative to the union's obligation to furnish each in an non-discriminatory fashion. In applying this test to the work-related publications, the Board viewed this benefit as indirect in that it was a "mere source of information", and, unlike the provision of insurance, "was not a benefit in and of itself".[27]

In UUP v. Barry,[28] a nonmember employee brought several charges against the union, one of which implicated the organization's DFR and statutory obligations. The charge alleged that the union had discriminated against nonmembers through its "refusal to represent them in actions against itself" relative to the alleged misuse of agency shop fees. The Board dismissed the charge in determining that "an employee organization is not obligated to represent unit employees in proceedings against itself."[29] The Board reached a different result with respect to a union's obligation to represent nonmember employees in UFT v. Barnett.[30] In Barnett, the union had engaged in the practice of providing representation for its members at hearings which were scheduled for the purpose of reviewing an employee's unsatisfactory performance rating. The union did not, however, provide such representation to nonmembers. The nonmembers brought an improper practice charge against the union pursuant to § 209-a.2(a) which alleged that this practice was coercive of their § 202 rights. In finding a violation of the provision, the Board stated that the subject of the heairng, at which representation was to be provided, was "job related" in that an unsatisfactory review could have salary implications. The Board examined whether or not the benefit involved was of "sufficient significance" such that its denial could tend to be coercive of nonmembers' decision to refrain from joining the union. In light of the foregoing, it seems that with respect to the dissemination of a particular benefit, an employee organization must consider both the "direct" nature of the benefit to be provided or withheld, and to the extent that such benefit is "sufficiently job related", whether or not its provision or denial may impact upon the employee's decision relative to union membership or nonmembership.

CONCLUSION

In reviewing the various Supreme Court decisions, the language of the Act, and the Board's application and interpretation of both, it is clear that a significant underlying consideration respecting the use of agency shop fees is to preserve the rights of nonmembers. Under Abood, and the language of §208.3 of the Act, employee organizations, in the interest of preventing nonmembers from deriving benefits had through the collective bargaining process without contributing any funds towards such efforts, are entitled to receive agency shop fees equivalent to the amount of union dues. However, as interpreted by the Court and the Board, employee organizations will only be entitled to the deduction where appropriate refund procedures have been effectuated and where the benefits distributed through agency fees properly collected are extended to nonmembers without any discriminatory impact. Only through such structural and procedural safeguards can nonmembers be guaranteed the exercise of their constitutional and statutory rights.

The extent to which the panoply of refund procedures must be made available to persons who become employed after the fiscal year's procedures have gotten underway, and the extent to which legislative efforts have a direct bearing upon terms and conditions of employment (e.g. increases in minimum wage, maximum hours of work, benefits upon retirement) are two areas in which we can expect to continue to see litigation seeking to resolve unanswered questions about the balance between the rights of agency fee payers and of unions seeking to represent the interests of those they represent.

FOOTNOTES

The assistance of Sandra McDermott, legal intern, in the preparation of this material, is gratefully acknowledged.

1. 431 U.S. 209 (1977).

2. 466 U.S. 435 (1984).

3. 475 U.S. 292 (1986).

4. 20 PERB 3039.

5. Ibid.

6. 11 PERB 3074.

7. See note 4 at 3076.

8. 21 PERB 3016.

9. 15 PERB 3011.

10. 21 PERB 3025.

11. See note 6.

12. 20 PERB at 3077.

13. 14 PERB 3018 at 3031.

14. 20 PERB at 3070.

15. See *Andrews v. Education Association of Cheshire*, 829F. 2d 335 (2d Cir. 1987), and *UUP*, 22 PERB 3003 (1989).

16. See note 13 at 3031.

17. 17 PERB 3031.

18. 20 PERB at 3076.

19. 17 PERB 3113.

20. *Ibid.*

21. 17 PERB 3008.

22. 17 PERB 3061.

23. *Ibid* at 3092.

24. 12 PERB 3117, 14 PERB 7011 (80 A.D. 2d 23 (3d Sept. 1981).

25. 14 PERB at 7036.

26. See note 19 at 3023.

27. See note 19 at 3044.

28. See note 21.

29. See note 21 at 3017.

30. 14 PERB 3017.

IV. FACULTY SAFEGUARDS

A. Arbitration of Faculty Disputes
B. Professors Without Tenure: The British Model
C. Professors Without Tenure: The British Model–A Response from the American Colonies
D. Employee Assistance Programs in Higher Education: The SUNY Experience

FACULTY SAFEGUARDS

A. ARBITRATION OF FACULTY DISPUTES

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—

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INTRODUCTION

Researchers in higher education collective bargaining confront a problem when they attempt to analyze arbitrated faculty disputes. The full texts of arbitrators' opinions and awards are seldom available for study. The libraries of the Baruch College National Center for the Study of Collective Bargaining in Higher Education and the Professions and the American Arbitration Assoication (AAA) contain some awards, but only a small fraction of the total. "Arbitration in the Schools," published by the AAA, and other labor arbitration reporting services present an occasional higher education award, but the great majority of faculty cases go unreported. The absence of a comprehensive collection of arbitration awards dictates that analysis of the results of arbitrating faculty matters is likely to be more impressionistic than scientific, and the brief review that follows is no exception.

The authors have collected 150 higher education arbitration awards, primarily from New York and the New England states. This sample is referenced as "faculty cases" below. A broad range of grievance issues is present, but the 66 cases dealing with appointment, reappointment, promotion, and tenure (ARPT) comprise the largest grouping. Labor arbitration data reported by the AAA for approximately 2500 cases in 1988[1] allows the following comparison with our group of faculty cases.

FACULTY CASES vs. INDUSTRIAL CASES

While the differences in sample size and sampling method might invalidate a rigorous statistical comparison of the two groups, the disparities demonstrated above show that the distribution of issues in the academic cases we have been able to assemble is very different from the range of issues in AAA cases. ARPT issues, which make up 44 percent of the higher education disputes, comprise less than 9 percent of the AAA groups. Discipline and discharge grievances occupy about 11 percent of the academic cases, contrasted with over 29 percent in the larger sample. Management rights disputes, all but absent in the faculty sample, command 6 percent of the arbitrators' efforts in the AAA groups. Work assignment and schedule matters, though weighted similarly in the two samples (7.6 percent AAA; 8.7 percent faculty), in all likelihood refer to different issues. For example, none of the many faculty contracts reviewed for this paper addresses a question such as: Shall the management department or the philosophy department teach the course, Ethics in Business?

These differences are not, in our opinion, due to sampling deficiencies. They reflect the intentions of the institutional groups that negotiated the agreements. As we have pointed out in another study,[2] subjects of real importance to many faculty members—appointment, reappointment, promotion, and tenure—are systematically subjected to limited review in most academic contracts. The substance of the decisions usually cannot be reached unless they are notoriously arbitrary, capricious, or discriminatory. The remedies available to the arbitrator are limited. Even the protection of procedural regularity is often limited because many of the acts at issue occur in privileged committees or because tainted processes may, on remand, be repeated by the same person who first harmed the grievant.

The disposition of cases in the two groups shows that 72 percent of faculty grievances in our sample were denied, versus a 51 percent denial rate reported by the AAA.[3] Why did so many more grievants prevail in the industrial sample? Is it because the unions' duty of fair representation allows weak cases to reach arbitration? There is no evidence to support this charge in our group of cases, and, even if there were, we would have no reason to assume that this phenomenon occurs more frequently in faculty unions. Is the greater denial rate for academic cases because most faculty contracts prohibit the arbitrator from examining matters of substance, leaving only procedural flaws to be corrected? We think this is firmer ground.

TABLE 1: FREQUENCY OF ISSUES ARBITRATED (percent of total)

Issue	Faculty Cases	AAA Cases
Appointment, reappointment, promotion, and tenure (ARPT)	44.0	8.8
Wages	12.0	10.7
Discipline and discharge	11.3	29.5
Work assignment and schedule	8.7	7.6
Layoff, recall, retrenchment	8.0	3.0
Fringe benefits	4.6	5.4
Arbitrability	3.0	11.8
Management rights	0.3	6.0

LIMITS ON THE ARBITRATOR

Our collection of awards shows that lack of procedural violation frequently results in the dismissal of a grievance that might have been decided otherwise if the substantive considerations, allowed by most industrial contracts, had been available to the arbitrator. A case in point occurred at a major Connecticut institution where an assistant professor was denied tenure based on a split committee vote: five in favor, one against, four abstentions. The university asserted that the grievant failed to publish scholarly articles, lacked a terminal degree, and was a mediocre teacher. His colleagues in the departmental tenure committee had voted unanimously in his favor citing published articles, a Master of Social Work degree commonly considered the terminal qualification in his field, and a preponderance of favorable student evaluations. An uninformed observer might have experienced some confusion upon finding that the two assessments weighed the same evidence and applied it to the same person. The case was arbitrable only because the college tenure committee had missed a deadline for forwarding written reasons to the candidate. The university argued that the arbitrator could not examine the quality of the reasons used to deny tenure because they were academic judgments and therefore beyond his reach. Arbitrator James Altieri voiced a frustration that other arbitrators echoed before and since:

> ...the arbitrator is required to make the determination he is instructed to by the agreement. No aid is furnished to the arbitrator by the University as to how he may make the determination without considering the nature of the reasons advanced.[4]

The only remedy available was to reinstate the grievant for one probationary year to allow a *de novo* tenure review in compliance with contractual procedures. Arbitrator Altieri could not weigh the merits of the disparate evaluations of the tenure candidate's qualifications, nor could he compel any change in committee makeup for the new review. This outcome is typical of several tenure review arbitrations in our sample.

If the deliberations and evidence used to decide on a faculty member's continuing employment cannot be examined by arbitrators, and if the same committee members and university officers perform the reevaluation, will the candidate be afforded due process? Assurances not specifically in the contract may seem rather pale to professors who contrast their situations with those of most unionized industrial employees.

Where contracts draw a clear line to delineate available remedies, experienced arbitartors seldom, if ever, cross that boundary. Where contract language is muddy or ambiguous, the arbitrator must interpret what the parties intended their agreement to mean, but in the vast majority of cases the arbitration process does no more than reflect back to the parties what they previously have agreed upon. Thus, if large areas of the employment relationship are not arbitrated, or are arbitrated under limitations inhibiting the review of and remedy for alleged improper acts, that is because the parties chose to exclude those areas from the contract and, hence, from arbitral review. Interestingly, the areas so affected in many higher education contracts involve the employment and advancement rights of the junior faculty. We shall suggest below that this arises from the institutional needs of both the administration and the union.

ARBITRATION IN THE PROFESSIONS

An arbitrator will deal with procedure only if it is rigorously required, and he will not create rights on which the contract is silent (for example, seniority protections for advancement). The arbitrator is a creature of the contract. If arbitration provides a weak protection of certain rights, it is because the parties want it that way. It has been suggested that limitations on review powers arise because faculty contracts cover professionals. A glance at matters which have been arbitrated in other professional relationships demonstrate that this is not so.

> —A major musical organization and its orchestra arbitrated whether one of the first desk woodwind players could be removed, not for any personal misconduct, but for erratic entry and improper intonation among other alleged professional faults.
>
> —Actors Equity contracts allow arbitrators to decide whether foreign actors meet criteria of distinction enumerated in the agreement which, if met, allow the actor to perform on American stages.
>
> —A professional employee of a newspapaer alleged, in a grievance that came before an arbitrator, that his permanent assignment was changed because he would not submit his book, which was written during non-work time, to a press designated by the paper's owners.
>
> —In a hall where the required minimum size of orchestra varied depending on whether a performing organization was of regional or national stature, an arbitrator was asked to categorize a company which appeared because management had specified an orchestra appropriate to the regional designation.

THE UNIQUENESS OF ARBITRATION IN HIGHER EDUCATION: AN EXPLANATION

Other speakers at this conference have noted the accommodations made between faculty unions and senates, committees, and other entities in the institution. Matters that might be of real interest to union members—curriculum, admission standards, and governance—are discussed and decided in these other bodies. It might be argued that since administrations have different relationships with senates or committees and may even sit on or with them, the administrations forced this separation of powers on the unions. Such might have been true in the early days of collective bargaining, but it seems unlikely in the well-established relationships that now exist.

We think that both the union and the administration chose to omit much of what appears in contracts in other sectors because that omission met mutual needs. Jurisdiction concerning academic subject matter not only might embroil a dean who must choose, if he had the power, between two departments as the locus for the subject, but might also embroil faculty with differing interests. So what is not simply a management versus employee problem is resolved in curriculum committees, or senates, or other groups. Similarly, seniority rights for promotion do not meet needs that either party recognizes.

The union's needs in some areas are not the same as those of large groups of its members. It does not seek to intrude in areas of professional concern and does not seek to do away with privileged committees. Since its own members sit on these committees, there is a difficulty, often noted, in challenging the decisions made. The institutional needs of these parties allow for much longer probationary periods than nurses, newspaper reporters, computer scientists, and other professionals must customarily endure. Also the rights of faculty during these probationary periods are very limited. Considerations like promotion, reappointment prior to tenure, merit pay, and scheduling perquisites are seldom based on objective measures which can be consulted to see if arbitrary action has occurred. If union members share in the decisions, this condition is understandable, but the faculty member must look outside of the union for protection that is either absent from or weak in the contract. In such areas arbitration and the arbitrator can have little function.

Where the interests of the union and the administration diverge, the contract will provide rights which arbitrators can enforce and which they have been asked to enforce. In a case where the president had, as allowed by the contract, granted tenure contrary to the recommendation of a committee below, an arbitrator found that the president could not then remove that tenure except for cause. After the tenure award, it had developed that limitations on the number of faculty position lines for the campus had been exceeded. The arbitrator ruled, however, that the president's action created a contract with the individual that was protected by the union agreement.

An arbitration arose in a major institution on whether assignments in a specific building violated the contract's health and safety article. There was colorable evidence that a statistically significant rise in incidence of a particular disease was observed among those who worked in the building.

Rights to certain salary increases specified in faculty contracts have been arbitrated, as have rights to teaching overloads, summer session courses, and even favored parking spaces.

Thus where the needs of the union diverge from those of the administration, arbitration seeking to enforce faculty rights will arise. Where the needs of the union as an institution coincide with those of the administration or the senate, arbitration will not arise. In academic contracts, the arbitrator who might wish to remedy deprivation of individual rights has much less power to do so than he or she can in other unionized professions. That is because the individual rights are covered by other institutional mechanisms which are not subject to contractual review or protection.

FOOTNOTES

1 "Study time," ed. Baderschneider, no. 4 (New York: American Arbitration Association, 1988), p.2.

2 "Higher Education Arbitration," in Labor and Employment Arbitration in America, v. III:87 (New York: Matthew Bender & Company, Inc., 1988).

3 "Study Time," op. cit., p.1.

4 University of Bridgeport and AAUP, AIS (Arbitration in the Schools) 90-13 (Altieri, 1977).

FACULTY SAFEGUARDS

B. PROFESSORS WITHOUT TENURE: THE BRITISH MODEL

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The world changed for British universities with the election, in May 1979, of the Conservative Government under Prime Minister Margaret Thatcher. The world was changing anyway, but the General Election of 1979 has produced a large and irreversible shift in the fortunes of the universities in the UK and their position within UK higher education.

There have been many changes in the decade 1979-1989 affecting the funding and organisation of the universities, apart from the abolition of tenure for academic staff, but they all stem from a basic radical position of the present government — a policy of deliberate reduction in the public sector funding of higher education.

In this talk, I should like to consider the forces that have led to the abolition of tenure within the universities of the UK and what the loss of tenure will mean to academic staff both in relation to their direct conditions of employment and the impact on academic freedom. But first, I should start by outlining what had been assumed to be the nature of tenure in UK universities.

THE NATURE OF TENURE

The universities in the UK have developed over the centuries in a variety of ways leading to a wide range of legal structures. Most are established by Royal Charter and Statute, although one or two such as the London School of Economics are Companies Limited by guarantee. The University of London was founded by Act of Parliament and the four ancient Scottish universities (three of which are fifteenth century papal establishments) are still largely governed by the Universities (Scotland) Act.

From the position in the ancient, ecclesiastical, establishments of office being held "aut vitam aut culpam", the security of employment for academic staff having passed a probationary period had tended to become formalised as a right to stay in employment without term until either:

1) retirement

2) resignation, or

3) dismissal for good cause.

In the UK, good cause effectively means that staff can only be dismissed for incompetence, incapacity or serious misconduct.

The term "tenure" itself seldom appears in charters and statutes. Its existence has to be deduced or construed by cross-referencing institutional statutes, regulations and ordinances with individual contracts of employment. The procedures which would have to be carried out before a member of the academic staff can be dismissed for good cause typically consist of carefully defined internal procedures or "due process", characterised by the rules of natural justice, in an enquiry by a committee appointed by the governing body. Taken together, therefore, the definition of good cause and the quasi-judicial dismissal procedures amount to a strong protection against arbitrary dismissal.

The justification for the elaborate internal procedures governing dismissal for good cause is generally expressed in terms of the need to safeguard academic freedom. The onus is placed on the university authorities to prove good cause. The accusers must be confident of their evidence and be able to withstand counterclaims.

It is also true, however, that the procedures are the "natural ones" within a university environment, based on the structure of internal democratic government and against a background of the duties and responsibilities of academic staff with known standards of scholarship and publication. There was, however, little talk of tenure in UK universities until the events of July 1981 when the University Grants Committee announced cuts of some 15% in the university system to be implemented over a two-year period. This occurred at a time when, demographically, the 18-year-old age group was still rising. The UK age-participation-rate at 13% was one of the lowest in the developed world. So the cutback was not to compensate for overproduction or lack of demand. As I explained earlier, it came simply from the unashamed policy of the Conservative Government that public expenditure on higher education had to be cut.

THE ATTACK ON TENURE

Sir Keith Joseph, Secretary of State for Education and Science, writing to a colleague MP three years later, says "The central problem is the need to make economies in higher education."

It became clear soon after July 1981, however, that universities could not simply shed staff on grounds of financial exigency in order to bring budgets in line with the new UGC limits. Indeed, only one or two institutions had any reference to "financial exigency" in their charter or statutes. And suddenly an interest was awakened in the statutory provisions of tenure. It was found that in about one-third of the institutions, tenure provision (by statute or by contract of employment or both) was "strong", in about one-third it was "less than strong" (generally in association with the statutory phrase "subject to the terms of appointment") and a further third, where if it was tested, there would be major difficulties. Irrespective of legal difficulties, however, the system continued to operate on the basis that academic staff had "de facto" tenure. To the present date, with thousands of members of academic staff who have left individual institutions in the wake of the 1981 cuts, either by redeployment or by premature retirement, only one member of staff has been explicitly dismissed by his institution on grounds of redundancy (and that reported dismissal is still a subject of dispute between the AUT and the institution).

However, although we won the battles, the war has continued to be waged against us, not least in the media and not least (I am sorry to say) by our own colleagues.

By autumn 1981, the voices were sounding loud. The Times reported, "Aging, burnt-out dons who are no longer capable of carrying out their full teaching and research activities, and the tenure system that protects them, were sharply criticised by Sir Peter Swinnerton-Dyer" (later to become chairman of the University Grants Committee and from 1 April 1989, the chief executive of the Universities Funding Council which has replaced the UGC). With such friends, who needs enemies....?

The same article in the Times reported that the Committee of Vice-Chancellors and Principals was looking into the tenure system with a view to making all future academic appointments more flexible so that it would be easier to make academic staff redundant without their being able to sue for breach of contract.

The Daily Telegraph, in a leading article in November 1981, alleged that "dons often get tenure for life when still very young and so sometimes spend 30 years paid for doing no work at all."

The Sunday Times dismissed the notion that tenure had anything to do with academic freedom. "The notion that you can pursue truth fearlessly only if you are lifted above the condition and delivered from economic worries is absurd."

One final quotation from the period — to let you realise the shallowness and malevolence of the argumentation:

> The prime problem is that many of the lecturers occupying crucial positions are parasites on the system, contributing little, blocking the promotion of working researchers and enthusiastic lecturers and preventing brilliant scientists from becoming permanent members of the university research community.

This was written by an academic and published in a reputable journal. Small wonder then that the defenders of tenure provisions within the UK universities had difficulties.

THE "TIMETABLE"

The next four years saw a succession of threats to tenure from government pronouncement and from vice chancellors and from the UGC:

September 1981. Vice Chancellors warn of possibility of redundancies and possible need to limit tenure.

February 1982. CVCP issues guidelines to universities for consideration: contracts of new academics should provide for dismissal or redundancy or financial exigency. There should be a longer probationary period. The document was largely ignored.

May 1982. Sir Keith Joseph, Secretary of State for Education and Science, wrote to Dr. Anthony Kelly, Vice-Chancellor of Surrey University, to say that academic tenure should not be abused to protect individual jobs irrespective of the consequences. Dr. Kelly was one of five Vice-Chancellors who, in March 1982, discussed with Sir Keith problems the universities had in achieving staff reductions to cope with reduced budgets.

May 1984. Sir Keith wrote the CVCP to say that the government was prepared, if necessary, to legislate to limit tenure. But he asked, would the universities be prepared instead to make their own changes, how could academic freedom be protected, how could probation be extended, did universities use existing "good cause" clauses for dismissal?

July 1984. The CVCP replied that the majority of universities could not bring about, by their own volition, the changes the government desired in the timescale envisaged.

August 1984. The government said it would introduce legislation as soon as the Parliamentary timetable allowed.

January 1985. The UGC warns that nothing should be done to undermine academic freedom. American practice should be followed to allow dismissal because of financial changes or if a subject area is dropped. There should be workable machinery for "good cause" dismissals.

December 1985. DES publishes consultation paper and invites comments by end of February 1986.

(The above timetable is taken from THES, 20 December 1986)

In July 1987, the die was cast. The Secretary of State for Education and Science announced that provisions to restrict tenure would be included in a forthcoming Education Reform Bill. The principal objective was "to ensure that institutions have the power to terminate the appointments of their academic and academic-related staff for reasons of redundancy or financial exigency and that this power cannot be waived." The changes were to apply to future appointments; (and to promotions, as it turned out) existing contractual rights of tenure would not be affected. The government announced that commissioners would be appointed in order to amend charters, statutes, etc., in each university institution in order to require that contracts of employment entered into by the institution could not preclude dismissal on grounds of redundancy or financial exigency. When those clauses of the bill relating to academic tenure were published, the cutoff date chosen for the abolition of tenure was specified to be 20 November 1987 and that any contracts entered into on or after that date might have to be amended retrospectively.

During the passage of the bill through the two Houses of Parliament, there were two major successes. Firstly, the provisions which related to financial exigency were removed. In the published form of the bill, they appeared — in a bizarre form — within the clause defining redundancy where they would have permitted the dismissal of someone on the grounds that someone more junior or cheaper could be appointed to the post. Following considerable opposition from AUT, this redefinition of redundancy was removed from the bill.

The second major achievement was to get a mention of academic freedom in the Act. The general issue of academic freedom was debated, particularly in the House of Lords, and an amendment was carried against strong government opposition. The effect of the amendment is that the commissioners, when they are changing charters and statutes, must:

> have regard to the need to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or

privileges they may have at their institutions.

This amendment is important as a matter of principle and as a political victory. It is not likely to affect what the commissioners actually do, but appears in that particular section of the Act simply because there was nowhere else suitable.

It had to be said that although the government was under pressure on various provisions of the Education Reform Bill, the clauses on the abolition of tenure had relatively few opponents. The superficial arguments that had been played over and over during the previous six years were brought out again by Ministers:

1) that tenure could not be afforded; it made academic staff expensive to get rid of

2) that tenure inhibits the exercise of management 'flexibility'

3) that tenure shields the '[illegible]petent and lazy'

4) that abolishing tenure [illegible]ve little effect because so few staff had it

5) that tenure might a[illegible] be [illegible]olished because polytechnic staff did not have it and [illegible]ble to manage, weren't they?

The fact that the arguments [illegible] contradictory did not seem important in the reiterations in Parliam[illegible] the link between individual academic freedom and tenure was neve[illegible]dressed.

As Paul Cottrell, an Assistant General Secretary at AUT, wrote in a recent paper for the UK Society for Research in Higher Education:

> When confronted on this point of principle, Ministers simply asserted repeatedly that no such relationship existed and demanded evidence to the contrary. By evidence they meant cases of clear attacks on individual academic freedom in British universities. Posing the debate in these terms of course begs the fundamental question of the extent to which the generally high degree of academic freedom sustained by our universities (and, through their example, our polytechnics) is due precisely to the existence of tenure, to the general assumptions about proper behaviour which its existence promotes, and, most importantly of all, to the deterrent that it presents against potential censorship and victimisation. There may well be a cost to pay for tenure in terms of both finance and efficiency, but is it not a price worth paying in the interests of academic freedom? Listening to the parliamentary debates on the Bill, it became very clear that the present Government places a very low value on academic freedom.

THE CURRENT STATUS

So, where are we now? The Act received the Royal Assent in the summer of 1988. The three commissioners were appointed, to be chaired by a retired Law Lord, Lord Fraser of Tullybelton. By one of the sad quirks of fate, Lord Fraser was killed in a car crash in a blizzard shortly before AUT was due to meet the commissioners. The death of Lord Fraser has upset the timetable for their work and we have still to meet with the commissioners. We intend to make representations on good cause and related matters, on disciplinary procedures, on grievance procedures, on appeal procedures and on redundancy procedures. In terms of the redundancy procedures stemming from the loss of tenure under the Act, we will be pressing for adequate procedures, for consultation before redundancies are declared and for an adequate compensation scheme where redundancies are unavoidable. A compensation scheme was promised several times during the passage of the legislation through the House of Commons, although it was not in the event given statutory backing.

So, in April 1989, we are not much further forward (or backward, as the case may be) as a result of the Act. A second reason for a lack of activity on this front is that we have been involved in the most intense and most intensive campaign of industrial action that we have ever undertaken. In pursuit of a salary settlement for two years (1988/89 and 1989/90), we withdrew on 9 January 1989 from all work connected with end-of-year examinations. This has resulted in the university employers moving from a zero-zero offer to an offer of six percent for 1989/90 plus a nonconsolidated payment of one-half percent for 1988/89. During this period, there has been very little discussion within institutions of the effect of the Education Reform Act.

Two phenomena, however, are identifiable. One is directly attributable to the loss of tenure provisions of the Act; both are consequences of the general political climate in the UK.

The first is that staff offered promotion within their own institution or a post at another institution have to consider whether the acceptance of the offer is worth the sacrifice of tenure. This has been most noticeable among staff in subjects thought to be "unpopular with government" and staff whose area of research is "controversial" or "sensitive".

The second is that research funding bodies, particularly governmental ones, are showing a distressing desire to impose restrictions on the publication of research findings. This leads also to what I might call the "preemptive cringe" of self-censorship. These two phenomena are academic reflections of a general problem observable in the UK under the present government, that of increasing centralism, censorship and restriction of individual liberty. The influences visible in the "Spycatcher" affair, the redrawing more tightly of the Official Secrets Act and overt acts of political censorship of broadcast and press information mean that individual freedoms are diminished, and hence, within them, academic freedom is also restricted.

The new Universities Funding Council set up under the Education Reform Act to replace the University Grants Committee will take as an early task that of separating the funding of teaching and research. This separation of research funding will restrict the power of an institution to protect academic freedom of individuals and of subject areas. In fact, it is potentially even worse than this. What is meant by "separation of funding of teaching and research" is quite different for vice-chancellors, for the UFC, for the Treasury Department and for Government Ministers. The understanding of the terms and the motivation for the split is quite different for each of those groups. The short-term outlook for academic staff in the wake of the Act is uncertain. In some ways, the fact that tenure is abolished only for appointments made on or after 20 November 1987 will tend to preserve the de facto (or do I mean mythological) belief in tenure. Also, the fact that the commissioners have to look at the charters and statutes of every institution will give AUT an opportunity to be involved in a close look at the conditions of service involved in each institution. In the longer term, it is important for the UK as a whole, and for the university system in particular,

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that an expansionist view of education is readopted. Educational opportunity through life and across the social spectrum are central to the period of technological and political change that we are in. Tenure for academic staff may seem to be just a footnote in this design but I believe that a reworking, a redefinition, a reestablishing of tenure would help to preserve the environment in which academic freedom for the individual, for the institution and for the nation can flourish. This will need a change from the ethos of monetary self-interest in which our present government operates — and which currently permeates the British media.

In summary, the situation post the abolition of tenure may be likened to the British weather. The current situation is that following a period of storms, there is a period of low cloud and mist. The outlook is uncertain — but we must get ready to take advantage of any sunny intervals.

FACULTY SAFEGUARDS

C. PROFESSORS WITHOUT TENURE: THE BRITISH MODEL – A RESPONSE FROM THE AMERICAN COLONIES

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The question is, of course, can it happen here. Is it possible that tenure as we know it could be abolished or, at least, cut into five- or seven-year contracts which would, in effect, be the end of the concept. The answer is yes, it is possible, and that makes Mr. McTernan's remarks all the more relevant. It could happen, but it would not happen the same way, and in the short run, it would seem that given the organization of the American educational system, with its local school boards, boards of trustees, state regents, local and state education departments, it would take some time for all these jurisdictions to take action. We do not have a national or federal education system like Britain so that one piece of legislation directing one minister and altering one budget could change the system overnight. But, that is not to say that an idea could not spread like wildfire among all these separate jurisdictions. We have seen other concepts from the drinking age to smoking rules passed from one government regulatory agency to another at all levels and, over time, to change how we operate without a national law.

The origins of the American system of tenure are deep in the mists of American history but they are tied to European roots. Like many other ideas which migrated across the Atlantic from Europe, tenure was taken over and fashioned to fit the peculiar American world vision of education of human and civil rights. We borrowed the idea of the university from Europe, but we have democratized it. We have taken great steps to make the academy less elite and exclusive, more accessible and available, which has brought problems of its own. Many of our older campuses mimic the Gothic architecture of Europe's older universities, but Americans got their architectural revenge if you have ever seen some of the buildings in Britain's Red Brick universities.

When we took over the idea of tenure we wrote it down, set forth procedures and limits, developed guidelines and definitions, included it in union contracts. A parallel can be drawn, perhaps, between our approach to tenure and our approach to political structure in general. Britain, justly famous for its unwritten constitution, its sets of precedents, individual Parliamentary laws and large doses of common sense, also did not feel the need to spell out tenure — it was a given — it was not really challenged.

We Americans, with our penchant for working out the details, have an abundance of brief but powerful documents at the core of our society — the Declaration of Independence, the Constitution, and the Bill of Rights — and while the Constitution has been amended again and again, (and is rewritten in one sense each Monday morning when Supreme Court decisions are announced) it does stand as a written bond. So, it is with tenure. It is as protected by statute and contract as any right can be, but it can also be changed and altered.

It seems to me that tenure is tolerable, as are all the other traditions and trappings of academic life, like the sabbatical and the nine-month work year, if the society at large perceives the entire operation as working well. Did you ever try to explain some of these academic perks to friends in business? They are likely to accept the whole package as a given, but cannot really understand the individual parts. For example, Supreme Court justices serve for life — to put them above party politics and beyond influence. These are both good things to be desired. We feel that these good things, on balance, outweigh our inability to hold them accountable by evaluation, reappointment, or reelection. If society began to have profound doubts about the functioning of the justices and the correctness of their opinions, we might want to reconsider life appointments. This could be the fate of tenure.

We need to ask the question then — are Americans so satisfied with the educational system and the students it produces that they (and the officials they elect) do not feel the need to question how the schools operate and what is going on in them. We know that there is dissatisfaction and we also know why the schools are less successful than society would like. We know that the environment in which we function — the breakdown of the family unit, the two-job household, television, drugs, etc. — have overwhelmed us — but it is easier for society to blame the schools for failure than to wrestle with the problems, and perception is, unfortunately, more often than reality, the motivator of action.

We in America live now in the age of accountability — from the Speaker of the House of Representatives to the local teacher. How do we measure, assess, quantify our success with students? How can faculty be held accountable — especially if tenured? So the climate is right for tenure, among other aspects of academic life, to come under scrutiny for some time to come.

A second fact to be wrestled with is that we have allowed local, state, and federal money to play a very large role in balancing education budgets. He who controls the purse can make the rules. When you add the direct aid to institutions and school districts, to student financial aid and loans, to tax considerations on rents and donations, an enormous amount of public money permeates American education. In dollars, I am sure you know that New York State has two of the five largest state-supported university systems — its own 64 campus SUNY system and also provides some funding for all the private colleges and universities in the state.

On one hand, those are positive signs. The state is supporting both private and public sectors; there is choice for the student; it preserves a great variety of institutions for the state university has no monopoly on educational opportunity. On a more sinister note, what happens when these governmental agencies, with their bureaucrats and legislators perceiving that the end product of the educational system is less than perfect, decide to tighten the reigns and make some rules to assist the educational institution in becoming more effective. Some states already have exist exams to test value added learning at all levels of education in the state. If students do not pass, who is at fault? They license primary and secondary faculty and how will they deal in the future with college faculty?

After eight years of President Reagan, we now have President Bush. Under Reagan, we knew where we stood. He had definite ideas and a clear vision of where he was going. He followed the script and was on the set taking directions every day. You either applauded his position or you worked within the system to counter his intent and you held your breath every time William Bennett made an announcement. With George Bush, we seem to be adrift. Some say it is because he still thinks he is Vice President. Except for declaring himself the "Education President", nothing much has happened. Think about that for a minute — "Education President". That is not necessarily a good thing if the place he wants education to go does not agree with one's view. At that point, one might be happier if he let well enough alone and let the educators run education. If he means more resources so educators can do the job, that is one thing; if he means more control to whip education into shape, it could mean academic decisions being made by non-academics for non-academic reasons — potentially very dangerous stuff — and, of course, at the heart of reform, if it comes, would be the need to rejustify tenure.

We do have some counter measures to state control of education, the principal one being the regional accrediting agencies such as Middle States. They have been the American solution to accountability without adopting the European model of having a single Minister of Education responsible for academic policy. The argument has always been that professional educators can take care of their own, just like doctors and lawyers, and do not need a government agency to do the job.

The time, money, and effort we spend with this one good organization have saved us from federal control in the past. Middle States is focusing on assessment and accountability as ways of heading off some sort of national oversight and in New York State, SUNY is working up assessment procedures to show the taxpayer how we measure success and to fend off State Education Department imposed regulations. If faculty cooperate with these plans, help fashion the procedures and design the instrument whose finding will educate our audiences, we might change public opinion. If faculty refuse to assist, these measures, when they come and they will come, will, of necessity, be imposed by the administration of the institution or the legislature or the State Education Department, without faculty input.

Ironically, the greatest argument for tenure is the preservation of academic freedom which is not often seen as being seriously challenged in recent times. The argument among the layman is because we enjoy freedom of speech, we do not need tenure to protect academic freedom. Most Americans would support academic freedom but if the only or principal vehicle to ensure it is life appointment of teachers, if there is no way of separating out all the other things, life appointment means (beyond academic freedom) then in America, as in Britain, tenure may crash on the shoals of "accountability" and "flexibility".

There are the two key phrases in the attack on tenure in the United Kingdom; "accountability" and "flexibility". Perhaps, American educators ought to pay heed and mount a counter offensive that answers these points before they are used to sink tenure. Can faculty support new forms of evaluation with action plans to follow up on noted deficiencies? Can they support inservice training or additional education to deal with burnout and stagnation? (CPAs are now taking many courses per year to keep their licenses current). Or, will they hide behind academic freedom figuring that since tenure is tied to it and Americans support academic freedom, there is no need to take steps toward demonstrating accountability or success rates. They may be surprised. Likewise, lack of flexibility in assigning faculty because of life appointments puts a tremendous amount of pressure on administrators who might otherwise have no desire to see a faculty member let go. What does one do when students no longer sign up for "X" or the school stops requiring "Y" of all students? How can the administrator plan for the future if all there is to work with is a set group of teachers locked into specific disciplines? Is there a long-range answer? Can cross training or interdisciplinary courses or further study by faculty in areas of new popularity answer the "flexibility" concern?

If administrators can move a strong teacher from failing discipline area "A" into rising discipline area "B", then the tenure of the faculty member need never be brought into question. It is rigidity in the face of declining enrollments that raises the question of releasing a tenured person and hiring someone in another area or, in the long haul, of trying to have nontenured faculty who can be hired and fired as there are shifts in student demand.

Here are three realities.

1. The public outcry for accountability is not likely to go away in the near future.

2. The financial fact of having the public treasury as a part of all education in America will continue.

3. The need for administrators to have flexibility in the face of shrinking student enrollment will continue.

Faculty may find themselves in the same position as their academic colleagues in the United Kingdom now find themselves if they do not take steps to diffuse some of these pressures for change and more than the loss of tenure may be at stake.

Can it happen here? Is it inevitable? No. But, like so much else, tenure, in this changing world, can no longer be taken for granted.

FACULTY SAFEGUARDS

D. EMPLOYEE ASSISTANCE PROGRAMS IN HIGHER EDUCATION: THE SUNY EXPERIENCE

Karen Grover Duffy
Associate Prof., Psychology, SUNY Geneseo
UUP Rep. to NYS Employee Assistance Program

Brief History of EAP's

Employee Assistance Programs, EAP's, have existed in some form since the early 1900's when companies such as Macy's and the Northern Power Company recognized the need for assistance for troubled employees. Such programs were designed, in particular, to treat white-collar workers who suffered from alcohol abuse.[1] While the major reasons for supporting EAP's in private industry are mainly pragmatic, there is some sense of corporate humanitarian responsibility.[2]

As you can see, the private sector was the first to recognize that 10 to 15 percent of the workforce experience some type of problem which interferes with job performance. Sample costs attributed to employee problems in the United States include $10.4 billion lost to disability, $4.9 billion lost to death due to suicide, accidents, or physical and emotional problems, and $20 billion lost through hospitalization and absence from the job.[3]

Private sector companies such as Allis-Chalmers, du Pont, Eastman Kodak, Kimberly Clarke and many others have found that EAP's return as much as $20 for every dollar invested in them. The return comes in the form of higher productivity, reduced absenteeism, and less frequent use of company-provided health care services.[4] Kimberly-Clarke, for example, found that after one year of existence, its alcohol program has reduced absenteeism by 43 percent and cut accidents by 70 percent.[5]

By the 1970's, EAP's had experienced tremendous growth. The programs began to concern themselves with all types of employees and employee personal problems such as family discord, mental health issues, financial problems, etc. In 1972, the Occupational Programs Office of the Federal Institute of Alcohol Abuse and Alcoholism offered grant money to assist in increasing the number of programs.[6]

Compared to the private sector in which 60 percent of the employees of the Fortune 500 companies are covered by EAP's, the public sector seems to have joined the EAP movement late. Today, however, there are EAP's operating in 33 state governments as well as in the federal government. Certain local governments have also established EAP's.[7]

History of EAP in New York State

The first EAP in New York was initiated in 1976 at nine different sites in the Mid-Hudson region. Funding was requested by the Civil Service Employee Association (CSEA) from the New York State Division of Alcoholism and Alcohol Abuse. This first New York State program was a referral service for troubled employees. By "referral service" is meant that employees were interviewed by "counselors" who assessed the problem and found a suitable external agency or resource to assist the employee. During the first fifteen months of operation, 1800 individuals were served.[8]

This concept, a referral service for troubled employees, spread quickly to other state agencies. In a short time (1983), the New York State labor unions comprised of CSEA, PEF, AFSCME Council 82, UUP, and the State of New York collaborated to oversee growth of the program. Hence, in New York, at least within state agencies, the EAP is a joint labor-management effort as well as a referral service. The two concepts, "referral service" and "joint labor-management" differentiate our program from those which do counseling in-house or which are administered either by labor or management but not both.

The New York program assisted 60,000 clients in 1987 alone. The service has grown beyond simply the referral concept. Many EAP's at state work sites also host health fairs, educational presentations, and so on to increase the visibility and credibility of the program.[9]

Advantages/Disadvantages of Referral versus In-House Service

The chief advantage of a referral service rather than an in-house EAP is, of course, cost. Referral services are usually less expensive than are in-house counseling services. Some universities have considered using the student counseling centers, but faculty and staff have objected to that for a variety of reasons. The chief disadvantage of a referral service is that the client or troubled employee may be referred to the wrong external service which may have no vested interest in correcting the mistake. An in-house counseling service, on the other hand, need only send the client next door to a different counselor specializing in that problem. The in-house center via its direct attachment to the parent organization seems to be accountable to that organization in its treatment of troubled employees.

Advantages/Disadvantages of Joint Labor-Management Programs

What are the advantages of a bilateral or joint labor-management program since either party, labor or management alone, could reasonably establish its own program? A jointly sponsored EAP:

> — is deemed to encourage open communication between management and labor about problems in the workforce from which management is not exempt, by the way. The National Council on Alcoholism has reported, for example, that the problem of alcoholism is greatest among executives between the ages 35 and 50, their years of primary value to most companies.[10]
>
> — is meant to build credibility for the program.

Support from top management is deemed essential for success[11] while employees trust labor unions which have generally been viewed to safe-guard employee rights.[12]

— is viewed as promoting understanding and acceptance of EAP because both labor and management contribute to policy development and because both labor and management recognize today that wages and salaries do not necessarily stimulate better job performance. Employees today seek improved quality of work life which can be provided in part by EAP's.

— might even improve relationships between labor and management since EAP's are usually perceived as rehabilitative rather than punitive.[13]

— can sometimes provide more funding for EAP since two organizations, not one, are contributing.

There exist programs that are established and administered by just labor or just management. There are institutions of higher education, for example, which are not organized by bargaining units, yet, these institutions contain EAP's. The programs may have been established at a grass roots level by employees or have been established by the administration in recognition of the fact that institutions of higher learning are not exempt from the influence of troubled employees. The New York model for the reasons cited above is a joint program, and therefore, may differ from others of which you may be aware or which you may encounter.

The disadvantages of joint labor-management programs are that the two involved parties are often adversarial, and EAP may become just one more arena for conflict, a situation which would tarnish rather than enhance the image of the program. Another situation which could arise is that in a joint program, unions might be perceived by their members as selling out to management, a situation which would give members the perception that the program is really management's and therefore, not be trusted even if confidential.

Administration of the New York State Program

How is the New York State joint labor-management EAP administered? The hierarchy of administration is often mind-boggling to the newcomer. However, at nearly every level of administration, the joint labor-management philosophy prevails. (See figure 1 for organizational chart which has been adapted from the New York Statewide Employee Assistance Program Manual, 1988). At the top level sits an advisory or executive board comprised of labor and management representatives. Each labor union is represented; the management representatives usually are employed by the Governor's Office of Employee Relations or some other high level administrative state agency.

In the second tier are the union advisors who may or may not be their union's representative to the advisory board, but who do attend the meetings of the board and who liaison with their union's executive board and members.

At the third tier is the program manager who oversees the budget, policy implementation, and personnel matters. Under him, are his staff (support or office staff and a training specialist) and the field representatives. Each geographic region of New York has one or more field persons who consult to local state agencies to assist with local program development, policy implementation and so

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FIGURE 1

NYS/CSEA/PEF/UUP/COUNCIL 82

Labor/Management Committees

Statewide Employee Assistance Program

ORGANIZATIONAL CHART

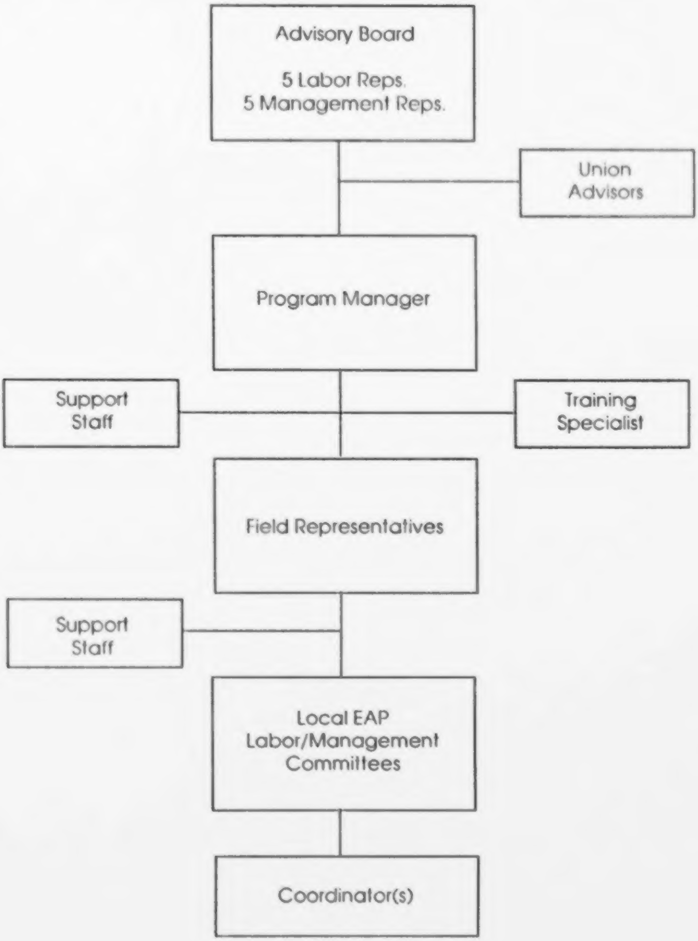
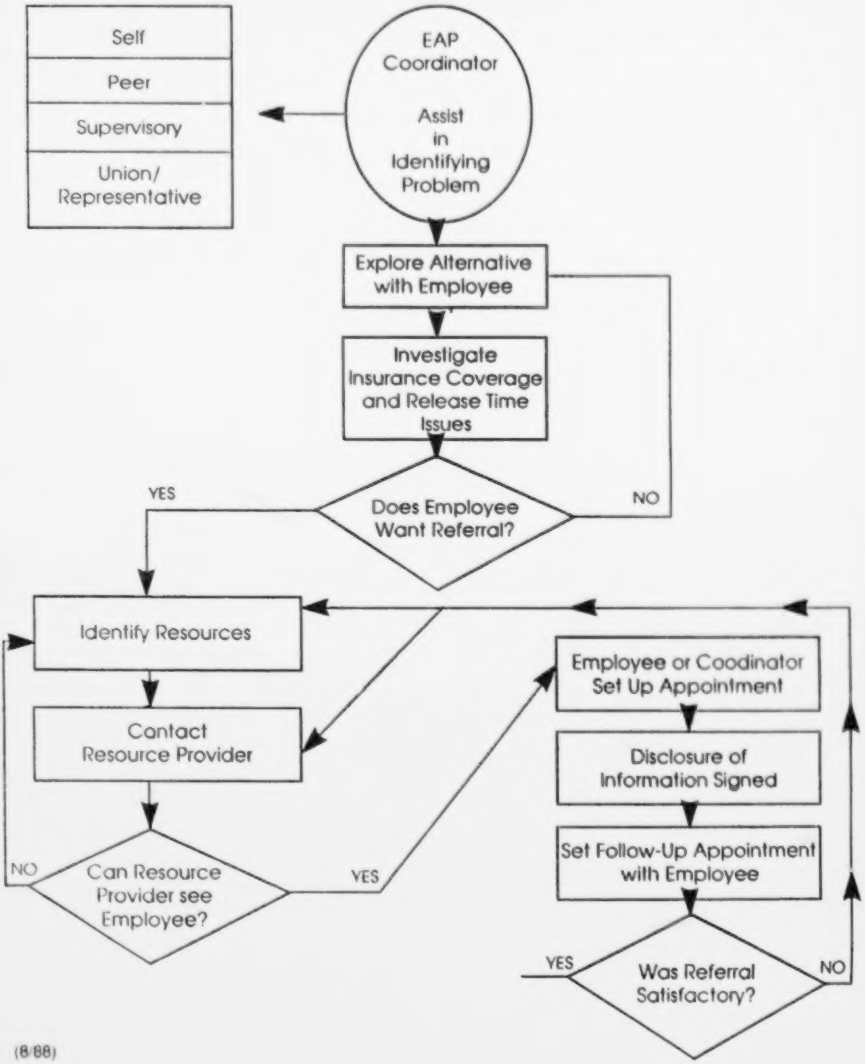

Advisory Board
5 Labor Reps.
5 Management Reps.
Union Advisors
Program Manager
Support Staff
Training Specialist
Field Representatives
Support Staff
Local EAP Labor/Management Committees
Coordinator(s)

FIGURE 2

Statewide Employee Assistance Program

COORDINATOR REFERRAL PROCESS


Self
Peer
Supervisory
Union/ Representative
EAP Coordinator
Assist in Identifying Problem
Explore Alternative with Employee
Investigate Insurance Coverage and Release Time Issues
YES
NO
Does Employee Want Referral?
Identify Resources
Contact Resource Provider
NO
Can Resource Provider see Employee?
YES
Employee or Coodinator Set Up Appointment
Disclosure of Information Signed
Set Follow-Up Appointment with Employee
YES
Was Referral Satisfactory?
NO

(8/88)

FIGURE 3

Statewide Employee Assistance Program
MONTHLY STATISTICAL REPORTING FORM
AGENCY SPECIFIC

____
Quarterly Report

Agency ______________________________

Field Representative Signature ______________________________

Date Completed ______________________________

A. Referrals # per month

Employee ______
Family Member ______
Total ______

B. Source of Referral # per month

Self ______
Peer ______
Supervisor ______
Union ______
Family ______
Other ______
Total ______

C. Bargaining Unit

# per month
______ 01 Secure Svcs. Unit
______ 02 Administrative Svcs. Unit
______ 03 Operational Svcs. Unit
______ 04 Institutional Svcs. Unit
______ 05 PS&T
______ 06 M/C
______ 08 SUNY Professional Svcs.
13 SUNY M/C
______ 14 SUNY Unassigned
______ 15 Sergeant Unit
______ NA
______ Total

D. Type of Assistance Offered # per month

Family Counseling Services ______
Mental Health Services (OP) ______
Mental Health Services (IP) ______
Substance Abuse Service (OP) ______
Substance Abuse Service (IP) ______
Cross Addiction Service (OP) ______
Cross Addiction Service (IP) ______
Alcoholism Services (OP) ______
Alcoholism Services (IP) ______
Legal ______
Financial Services ______
Self-Help Groups ______
Medical ______
Career Counseling ______
Union Issue ______
Management Issue ______
Other (specify) ______
[OP-outpatient/IP-inpatient] ______

E. Subsequent/Follow-up Contacts # per month

Employee ______
Family Member ______
Total ______

H. Summary of Coordinator Time Use Hrs./Mo.

Total number of hours allocated for coordinator(s) per month ______
Number of hours used beyond those allocated ______
Direct employee contact ______
Attending EAP functions, meetings, presenting orientations, training (specify) ______
Identifying local resources ______
Report preparation ______
Other than EAP sponsored training ______
Supervision consultation ______
Union consultation ______
Administrative
Program promotion
Travel

I. Informational Contacts

Number of contacts ______
Number of hours ______

List facilities not reporting:
____
____
____

on. Their suppot staff generally include one secretary/receptionist each.

At the lowest level, the local programs at each work site are administered by local joint labor-management committees which mimic the statewide advisory board. The local committees establish local policy, appoint the "counselor" (which we call "coordinators" because they do not counsel, but rather make referrals), network with local care providers, publicize the program, and train local employees and supervisors on how to utilize the program, etc. Hence, each SUNY campus has its own joint labor-management committee to locally administer its program.

The Issue of Confidentiality

Another feature deemed critical to the New York State EAP is confidentiality of the client. Confidentiality ensures that no one, no labor union steward, nor supervisor, and no management person will ever know that an employee made use of EAP unless that employee requests the coordinator to reveal that information. We feel that only under confidential circumstances is an employee most likely to take advantage of what the program has to offer. Only minimal records are kept by the coordinator; records include the nature of the problem, the unit (for example, the bargaining unit) of the employee, and the type of service to which each employee was referred. No names are ever recorded except on the disclosure of information form, the form utilized by the employee when he or she wishes another individual (such as a supervisor) to know that EAP was contacted by him or her. (Figure 2 indicates the flow of the referral process and where disclosure becomes an issue. Figure 3 contains the types of data which are accumulated by the coordinator).

Who Utilizes EAP on the SUNY Campuses

Most of our EAP clients at the SUNY colleges are walk-ins or employees who voluntarily utilize EAP. I have no exact numbers, but note that these data are at variance with trends in the national data where 45 percent of the EAP clients originate from supervisory referrals, 40 percent by self-referral, and 2.2 percent by peer referral.[14]

On our campus of approximately 550 employees, our EAP, depending on the time of year, receives from one to six clients a month with perhaps only one faculty member every other month, utilizing the service. (We are surprised to find that the winter holiday season is not a high use time as suggested by the mental health literature; we are not surprised that the summer months, when campus is less crowded and the weather is better, are the months of least utilization).

As you may have guessed, the faculty are the constituency least likely to request EAP services. Professional staff (such as persons who administer student activities), janitorial, and clerical staff are far more likely to take advantage of the program. Faculty, as members of a professional bureaucracy, often perceive themselves as autonomous, intelligent, and well-educated enough to take care of their own problems. The last thing they desire is outside interference in their work life.[15]

Adding to the problem of the reluctance of faculty to utilize EAP is the fact that most professionals have only loosely defined job descriptions and unwritten or scantily written performance standards and objectives thereby making impairment or performance problems more difficult to detect. Peers further exacerbate the detection problem because "professionals are notoriously reluctant to act against their own".[16] In fact, some faculty might even cover-up (or "enable") anothe troubled faculty member's mistakes or poor performance.

Supervisors, including department chairs, can refer an employee to EAP on any campus, but the bulk of the client load does not originate from supervisory referral as it might in the private sector or at other state agencies. Supervisors, especially department chairs, who generally are or were faculty members, are reluctant to suggest EAP to employees. Often, as a last resort, chairs recommend EAP when the overseers of the program prefer to promote the program as an early intervention technique.

EAP and Supervisory Referral in the New York System

The word "suggest" is not to be taken lightly here. Supervisors on our campuses and in other state agencies can only suggest EAP; they cannot require EAP. Again, our model may differ from any you know where EAP can be required as a condition of continuing employment.

Another key element of our program is that EAP participation is voluntary for the employee. It is not surprising, then, that employees who voluntarily seek help are considered to be motivated to take advantage of that help. At least, this is the philosophy which prevails in the New York State system. Again, there are private sector companies, other agencies, and institutions of higher education where EAP is required if the employee wants to keep his or her job.

How Does A Supervisor Know When To Recommend EAP?

Supervisors in the New York system ideally are trained to monitor job performance. When peformance declines and a personal problem is suspected as the culprit, EAP is suggested to the employee. Whether the employee utilizes EAP is the employee's, not the supervisor's, business. Supervisors might assume that EAP or some other help has been sought if or when the job performance rises again. Employees are not exempt from disciplinary action if they seek EAP help. However, with their permission, the EAP coordinator can reveal that the program is being used. The supervisor, then, at his or her discretion can delay disciplinary action or abandon it altogether. Peers, such as fellow faculty members or union representatives, are free to suggest EAP, too, but, of course, cannot administer discipline and, as mentioned above, are often reluctant to do so in the professional ranks.

We suspect that peer referral could exert a strong force on a fellow employee to seek out EAP help, but we have no data so far that this is the case. However, the thinking is in line with our notion, in the New York system, that peers ought to serve as coordinators. Our coordinators are often, but not always, one or two faculty members who have been trained in statewide development programs. The training includes interviewing skills, confidentiality policies, assessment skills, and so on.

FOOTNOTES

1. Statewide Employee Assistance Program, New York State Statewide Employee Assistance Program Manual (Albany, N.Y.: Statewide Employee Assistance Program, 1988), p. I-1 to I-2.

2. Duane Schultz and Sydney Schultz, Psychology and Industry Today (New York, N.Y.: Macmillan, 1986), p. 471.

3. Andrew DuBrin, Personnel and Human Resource Management (New York, N.Y.: Van Nostrand, 1981), p. 308.

4. Schultz and Schultz, p. 469.

5. "Wellness: A New Concept in Health Care," *American Pharmacy*, January 1982, p. 42-46.

6. Bureau of National Affairs Special Report, 1987.

7. *Statewide Employee Assistance Manual*, p. I-1.

8. *Ibid*, p. I-2.

9. *Ibid*, p. I-2.

10. Schultz and Schultz, p. 469.

11. DuBrin, p. 308.

12. *Statewide Employee Assistance Manual*, p. II-2 to II-4.

13. DuBrin, p. 308.

14. Terry Blum and Paul Roman, "Alcohol, Drugs, and EAP's: New Data from A National Study," *The Almacan*, 1986, p. 20-23.

15. Henry Mintzberg, *The Structuring of Organizations: A Synthesis of the Research* (Englewood Cliffs, N.J.: Prentice-Hall, 1971), p. 378.

16. *Ibid*, p. 374.

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